things, that in her efforts to locate desirable housing, relator was discriminated against because of her race, color, and ancestry, which discrimination has been made unlawful by the amended Ordinance.

9. Relator states that she made a written request of respondents to perform their duties as set forth in the amended Ordinance.

10. The Commissioners, by unanimous vote on January 30, 1965 declined to process or handle relator's complaint.

11. On February 1, 1965 relator made a demand upon the City Director of Law to bring an action in mandamus, to compel the Commission and Mayor to enforce the amended Ordinance. In his reply dated February 1, 1965, the City Director of Law refused to bring the requested action.

12. Relator believes and therefore avers that the Commission has failed to fully organize itself, does not have a permanent chairman or other person authorized to call a meeting and has not adopted such rules and regulations as may be necessary to carry out the purposes and provisions of this Ordinance, all of which failures are contrary to law.

13. Relator believes and therefore avers that the Mayor, as Chief Executive of the City of Akron, Ohio, and the municipal officer in whose office the Commission was established by Section 2 of the amended Ordinance, has the obligation of calling a meeting of the Commissioners for the purpose of completing their organization and doing all other things necessary to process relator's complaint.

14. Relator states that on the date the Mayor and Commissioners were served with a copy of relator's complaint,

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 63

THE STATE OF OHIO, EX REL. NELLIE HUNTER,
ON BEHALF OF THE CITY OF AKRON,
Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE
CITY OF AKRON, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

APPEAL WAS DOCKETED ON APRIL 24, 1968.
PROBABLE JURISDICTION NOTED JUNE 3, 1968.

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 63

THE STATE OF OHIO, ex rel. NELLIE HUNTER, on Behalf of the City of Akron,

Appellant,

against

EDWARD O. ERICKSON, Mayor of the City of Akron, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

INDEX

RECORD FROM THE COURT OF APPEALS FOR THE NINTH JUDICIAL DISTRICT OF OHIO:

IN THE

Court of Appeals

Ninth Judicial District

No. 5601

THE STATE OF OHIO, EX REL NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON, 1433 Orlando Avenue, Akron, Ohio,

Plaintiff-Relator

vs.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, Akron Municipal Building, Akron, Ohio.

RAY C. SHEPPARD, CITY DIRECTOR OF LAW, Akron Municipal Building, Akron, Ohio,

and

KENNETH KOLLER, c/o Ken Koller Real Estate Co., Ohio Building, Akron, Ohio,

WILLIAM S. PARRY, 925 S. Main Street, Akron, Ohio,

MARTHA BIRNBAUM, 584 Woodside Drive, Akron, Ohio,

ROBERT C. WILSON, 47 N. Main Street, Akron Ohio,

CLIFFORD E. GATES, 250 E. Market Street, Akron, Ohio. Constituting the Members of the Commission on Equal Opportunity in Housing,

Defendants-Respondents.

PETITION

(Filed: Court of Appeals, Summit Co., Ohio, Feb. 3, 1965.)

1. Relator, Nellie Hunter, states that she is a citizen and taxpayer of the City of Akron, Ohio. She brings this action on behalf of the said municipality, on behalf of herself and all others similarly situated.

2. Respondent, Edward O. Erickson, at all times mentioned herein was and still is the Mayor of the City of Akron, Ohio, an incorporated municipality.

3. Respondent, Ray C. Sheppard, is presently the City Director of Law for Akron, Ohio.

4. On July 14, 1964, the City Council of Akron, Ohio passed Ordinance Number 873-1964, which was approved by the Mayor, July 18, 1964, and became effective on that date. A certified copy of that Ordinance is attached hereto as Exhibit A.

5. On July 21, 1964, Section 6 of the Ordinance was amended by Ordinance Number 926-1964, which was approved by the Mayor, July 22, 1964, and became effective on that date. A certified copy of that Ordinance is attached hereto as Exhibit B.

6. Respondents, Kenneth Koller, William S. Parry, Martha Birnbaum, Robert C. Wilson, and Clifford E. Gates, constitute the Commission on Equal Opportunity in Housing (hereafter referred to as "Commission") appointed by the Mayor as required by Section 2 of Ordinance 873-1964.

7. Relator states that as a citizen of Akron, Ohio she is one of the persons whom the amended Ordinance was enacted to protect against unfair housing practices caused by discrimination on the basis of race, color, religion, national origin, or ancestry, and that she has a legally enforceable right to have the amended Ordinance enforced.

8. Relator states that on the 26th and 27th of January 1965, the Mayor and members of the Commission were served with a copy of an affidavit, alleging, among other

the amended Ordinance was, and still is, in full force and effect.

15. Relator states that she has no adequate remedy at law, which will enforce performance by the respondents.

WHEREFORE, plaintiff-relator prays for a Writ of Mandamus: (1) Directing the respondent, Edward O. Erickson, as Mayor of the City of Akron, Ohio, to convene the Commission, for the purpose of processing relator's complaint and the complaint of all others similarly situated; (2) Directing Edward O. Erickson to require that the Commission do all other things necessary to carry out their duties under amended Ordinance 873-1964; (3) Directing each and all of the Commissioners to officially receive and investigate relator's complaint and the complaint of all others similarly situated, and then to do all other things required by the amended Ordinance, if in their discretion probable cause exists for relator's complaint; (4) Directing the City Director of Law to take such action as prescribed in the amended Ordinance for the enforcement of the orders of the Commission, if said Commission shall deem it necessary to certify to him the record of its proceeding, of relator's complaint; or (5) Show cause before this Court, at a time to be fixed, why they should not do so. Relator prays that this Court find she had good cause to believe her allegations well-founded and to allow her her costs, and, if the Writ be granted, to allow as part of her costs a reasonable compensation for her attorney.

NORMAN PURNELL,
Attorney for Plaintiff-Relator.

(Verification)

Exhibit A, Annexed to Petition

(ORDINANCE No. 873–1964)

ORDINANCE No. 873–1964 declaring a public policy of equality of opportunity in housing, creating and establishing a commission in the Office of the Mayor, which commission shall be called the "Commission on Equal Opportunity In Housing"; prescribing the duties of said Commission on Equal Opportunity in Housing; prohibiting certain acts as unfair housing practices; and declaring an emergency.

WHEREAS, The population of The City of Akron consists of people of different race, color, religion, ancestry or national origin, many of who live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing; and

WHEREAS, These conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of The City of Akron and reducing its productive capacity; and

WHEREAS, The harmful effects produced by discrimination in housing also increase the cost of government and reduce the public revenues, thus imposing financial burdens upon the public for the relief and amelioration of the conditions so created; and

WHEREAS, Discrimination in housing results in other forms of discrimination and segregation which are prohibited by the Constitution of the United States of America, and are against the laws and policy of the State of Ohio and The City of Akron; and

Exhibit A

WHEREAS, Discrimination in housing adversely affects the continued redevelopment, renewal, growth and progress of The City of Akron;

NOW THEREFORE, BE IT ENACTED by the Council of The City of Akron:

SECTION 1. /DECLARATION OF POLICY.

It is hereby declared to be the policy of The City of Akron, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the City's trade, commerce and manufacturers, to assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin, and to that end to prohibit discrimination in housing by any person or institution.

SECTION 2. To effectuate said policy there is hereby created in the Office of the Mayor a Commission on Equal Opportunity in Housing, which shall consist of five members who shall be appointed by the Mayor for a term of five years each; provided, however, that when the first Commission on Equal Opportunity in Housing shall be appointed under the provisions herein, the members thereof shall be appointed for one, two, three four, and five years, respectively.

SECTION 3. DEFINITIONS.

As used in this ordinance, unless a different meaning clearly appears from the context, the following term shall have the meanings ascribed in this section:

(a) "Person" means any individual, partnership, association, organization, corporation, legal representative,

trustee, receiver, any owner, lessee, proprietor, manager, agent, or employee; any real estate broker, salesman, managing agent, or other person having the right to sell, rent, lease, sub-lease, assign, transfer, or otherwise dispose of a housing accommodation, or having the right to negotiate a sale, rental, lease, sublease, assignment, transfer, or other disposition of a housing accommodation; the state, any of its political subdivisions, or any authority, agency, board, or commission thereof; lending institution regularly engaged in the business of lending money or guaranteeing loans; and other organized groups of persons;

(b) "Housing" means any buildings, structure, or part thereof which is used or occupied, or is intended, arranged, or designed to be used or occupied as the permanent or temporary home or residence of one or more human beings; or any vacant land for sale or lease for housing; provided that housing does not include rental accommodations in owner-occupied dwellings in which the owner, at the time of rental, maintains one of the accommodations as his family residence.

(c) "Unlawful housing practice" means any act prohibited by Section 4 of this Ordinance.

(d) "Discrimination" means any difference in treatment, including segregation, directly or indirectly, because of race, color, religion, national origin, or ancestry.

(e) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing because of race, color, religion, national origin, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, national origin, or ancestry as a condition of affiliation or approval.

Exhibit A

(f) *Commission.* The term "Commission" means the Commission on Equal Opportunity in Housing established in the Office of the Mayor pursuant to this Ordinance.

SECTION 4. PROHIBITIONS.

It shall be an unlawful housing practice:

(a) For any person because of race, color, religion, or national origin, or ancestry to:

(1) Refuse to sell, rent, lease, sublease, assign, transfer, or otherwise deny or withhold any housing to any person, or to refuse to negotiate for any such purpose;

(2) Represent to any person that housing is not available for inspection when in fact it is so available;

(3) Discriminate against any person in the terms, conditions, or privileges of the sale, rental, sublease, assignment, or transfer of any housing or in the furnishing of facilities or services in connection therewith.

(b) For any person to whom application is made for financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of any housing to:

(1) Make written or oral inquiry as to the race, color, religion, national origin, or ancestry of the person or persons seeking such financial assistance or of prospective occupants or tenants of the affected housing;

(2) Discriminate against any person or persons because of race, color, religion, national origin, or ancestry in the terms, conditions, or privileges relating to the obtaining or use of such financial assistance.

Exhibit A

(c) For any person to include in any transfer, rental, or lease of housing any restrictive covenants; or for any person to honor or exercise, or attempt to honor or exercise any restrictive covenant pertaining to housing;

(d) For any person to print or publish, or cause to be printed or published, any notice or advertisement relating to the transfer, rental, or lease of any housing which indicates any preference, limitation, or specification based on race, color, religion, national origin, or ancestry;

(e) For any person to aid, abet, incite, compel, or coerce the doing of any act defined in this section as an unlawful housing practice, or to obstruct or prevent any person from complying with this section or any order issued under this section or to attempt, directly or indirectly, to commit any act defined in this section to be an unfair housing practice;

(f) For any person to induce or solicit a housing listing or transaction by misrepresentations regarding the present or prospective composition of a neighborhood, or the effect of such composition of the neighborhood, where such misrepresentations include a reference to the race, color, religion, national origin, or ancestry of any other person.

SECTION 5. DUTIES OF THE COMMISSION ON EQUAL OPPORTUNITY IN HOUSING.

It shall be the duty of the Commission to:

(a) Initiate or receive and investigate complaints charging unlawful housing practices;

(b) Seek conciliation of such complaints, hold hearings, make findings of fact, issue orders and publish its findings of fact and orders in accordance with the provisions

of this ordinance and with the ordinance establishing the Commission;

(c) Render from time to time, but not less than once a year, a written report of its activities and recommendations with respect to fair housing practices to the Mayor and to the City Council; and

(d) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance.

SECTION 6. Enforcement Procedure.

(a) A complaint charging a violation of this ordinance may be made by the Commission itself or by an aggrieved individual.

(b) The Commission shall make a prompt and full investigation of such complaint of an unlawful housing practice.

(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

(d) In any case of failure to eliminate the alleged unlawful housing practice charged in the complaint by means of conciliation or persuasion and upon making a determination of probable cause for crediting the allegations of a complaint filed hereunder, the Commission may direct the Law Director of the City of Akron to commence an action in the Court of Common Pleas within

the county in which the alleged violation, which is the subject of the complaint, occurs, or in which any defendant resides, or transacts business, seeking appropriate injunctive relief against such defendant or defendants, in order to prevent any conduct tending to render ineffectual any steps that the Commission or the courts may take in order to eliminate or remedy such violation, and in such action to seek orders restraining and enjoining such defendant or defendants from selling, renting, or otherwise making unavailable to the person or persons discriminated against the housing accommodations with respect to which the complaint is made, and the court shall grant such temporary relief or restraining orders, upon such terms and conditions, as it deems just and proper, pending the final determination of the proceedings under this title. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful housing practice, hereinafter referred to as respondent, a statement of the charges, made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the complaint. The respondent shall have the right to file an answer to the complaint, to appear at the hearing in person or to be represented by an attorney or any other person, in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses. At such hearing the Commission shall have the power to issue subpoenas to compel the attendance of the witnesses and the production of books and papers and other evidence necessary for a determination of the complaint.

(e) If upon all the evidence presented, the Commission finds that the respondent has not engaged in any unlawful housing practice, it shall state its findings of fact, dismiss the complaint, and instruct the Director of Law of the City of Akron to dismiss any legal proceedings which may have

been instituted in the Court of Common Pleas. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant. If the Commission further finds that relief of a final and permanent nature is warranted to eliminate or remedy any unlawful housing practice and to enforce the provisions of this title, it shall direct the Law Director of the City of Akron to prosecute any action or proceedings in the appropriate Court of Common Pleas as may be necessary to obtain such relief and enforcement.

SECTION 7. EXCEPTIONS.

Nothing in this ordinance shall prohibit the sale, lease, rental or transfer of real property or any interest therein as between private parties, provided, however, that such transaction or transactions shall not have the effect of placing the property upon the public or open market, or invite the public to bid upon, offer, or accept an offer for the sale, lease, rental or transfer of such property.

SECTION 8. SEVERABILITY.

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons or circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein,

Exhibit A

and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

SECTION 9. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, for the reason that it is desirable to eliminate discrimination in housing at the earliest possible moment, and provided this ordinance receives the affirmative vote of two-thirds of the members elected or appointed to Council it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

Passed: July 14, 1964

JOSEPH A. DENHOLM
Clerk of Council

LARRY Z. KISH
Acting President of the Council

Approved: July 18, 1964

EDWARD ERICKSON
Mayor

Exhibit B, Annexed to Petition

(Ordinance No. 926-1964)

Ordinance No. 926-1964 amending Section 6 of Ordinance No. 873-1964, passed July 14, 1964, relating to equal opportunity in housing, for clarification and to provide a penalty for violation of said ordinance, and declaring an emergency.

Be It Enacted by the Council of the City of Akron:

Section 1. That Section 6 of Ordinance No. 873-1964, passed July 14, 1964, be and the same is hereby amended to provide as follows:

"Section 6. Enforcement Procedure

"(a) A complaint charging a violation of this ordinance may be made by the Commission itself or by an aggrieved individual.

"(b) The Commission shall make a prompt and full investigation of each complaint of an unlawful housing practice.

"(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the alleged unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

"(d) In any case of failure to eliminate the alleged unlawful housing practice charged in the complaint by means of conciliation or persuasion, the Commission shall hold a public hearing to deter-

mine whether or not an unlawful housing practice has been committed. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful housing practice, hereinafter referred to as respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the complaint. The respondent shall have the right to file an answer to the complaint, to appear at the hearing in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses. At such hearing the Commission shall have the power to issue subpoenas to compel the attendance of the witnesses and the production of books and papers and other evidence necessary for a determination of the complaint.

"(e) If upon all the evidence presented, the Commission finds that the respondent has not engaged in any unlawful housing practice, it shall state its findings of fact, dismiss the complaint. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant.

"(f) In the event the respondent fails to comply with any order issued by the Commission, it shall certify the case and the entire record of its proceedings to the City Director of Law for appropriate action to secure enforcement of the Commission's order.

"(g) Any person who violates any of the provisions of this ordinance or any rule or regulation adopted by the Commission or who fails to comply

with any order of the Commission, shall be subject to a fine not exceeding Fifty and 00/100 Dollars and costs."

SECTION 2. That existing Section 6 of Ordinance No. 873-1964, passed July 14, 1964, be and the same is hereby repealed.

SECTION 3. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, for the reason that it is desirable to clarify a portion of said ordinance and it is to the best interest of the public that a penalty for violation of said ordinance be enacted; and provided this ordinance receives the affirmative vote of two-thirds of the members elected or appointed to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

Passed: July 21, 1964

JOSEPH A. DENHOLM
Clerk of Council

By: ROSE RAIRS Deputy Clerk of Council

RALPH F. TURNER
President of the Council

Approved: July 22, 1964

EDWARD ERICKSON
Mayor

Alternative Writ of Mandamus

(Title Omitted in Printing)

(Filed: Court of Appeals, Summit Co., Feb. 3, 1965.)

Before the Court came plaintiff-relator, Nellie Hunter, and made application for the allowance of a Writ of Mandamus; in consideration of relator's application, the Court allowed an alternative writ to issue against the defendants-respondents, returnable to this Court on the 5th day of March 1965, at 10 o'clock, A.M.

It is Ordered that the respondent, Edward O. Erickson, mayor of the City of Akron convene the Commission on Equal Opportunity in Housing established pursuant to City of Akron Amended Ordinance 873-1964, for the purpose of processing relator's complaint and the complaint of all others similarly situated; that Edward O. Erickson, Mayor of Akron, require that the Commission do all other things necessary to carry out their duties under Amended Ordinance 873-1964; that each and all of the Commissioners officially receive and investigate relator's complaint and the complaint of all others similarly situated, and then do all other things required by the Amended Ordinance; that the City Director of Law take such action as prescribed in the Amended Ordinance for the enforcement of the Commission's orders if the Commission deems it necessary to certify to him the record of its proceedings on relator's complaint; or that, at the time and place of the return of this Writ, respondents show cause why they have not done so.

Oscar Hunsicker,
Presiding Judge.

Answer

(Title Omitted in Printing)

(Filed: Court of Appeals, Summit Co., June 10, 1966.)

Now come the Defendant and for their joint answer to the amended petition herein admit the allegations contained in the first, second, third, fourth, fifth, sixth, ninth, tenth and eleventh paragraphs therein contained.

Further answering, Defendants say that the electors of The City of Akron voting at the General Election held on November 3, 1964, approved an amendment to the Charter of The City of Akron, providing as follows:

> "Section 137. (Regulation of Real Property Rights)
>
> Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisements, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein."

Further answering, Defendants say that any cause of action based upon Ordinance No. 873-1964 and/or Ordinance No. 926-1964 is barred by the Charter Amendment hereinabove recited.

Further answering, Defendants deny each and every allegation in the amended petition contained not herein specifically admitted to be true.

Alvin C. Vinopal,
Assistant Director of Law,
City of Akron,
Attorney for Defendants.

(Verification)

Reply

(Title Omitted in Printing)

(Filed: Court of Appeals, Summit Co., July 5, 1966)

Now comes the plaintiff-relator, and as reply to defendants' joint answer to the amended petition herein, says as follows:

1. Plaintiff admits that the electors of the City of Akron, voting at the November 3, 1964 general election cast a vote in favor of the language contained in single spacing in defendants' answer under the heading "Section 137. (Regulation of Real Property Rights)".

2. Plaintiff denies that the language referred to in any way affects Ordinance 873–1964 and/or Ordinance 926–1964 for the following reasons:

(a) Ordinance 873–1964 became effective on July 18, 1964 and Ordinance 926–1964 became effective on July 22, 1964. The language referred to as Section 137 was put on the ballot after petitions headed "Initiative Petition for Charter Amendment" containing valid signatures of more than ten per cent of the electors voting in the last general election of the City of Akron were filed with the Clerk of Council in the City of Akron August 25, 1964. The language referred to as Section 137, particularly its second sentence, is an attempt to have a referendum on Ordinances 873–1964 and 926–1964. Section 19 of the Charter of the City of Akron requires that petitions calling for a referendum must be filed with the Clerk of Council within thirty days after passage of an ordinance. The petitions referred to in this sub-paragraph were not filed within thirty days after passage of either ordinance and are therefore invalid under the Charter of the City of Akron and this supposed Section 137 was improperly on the ballot.

(b) Section 137 purports to affect "any ordinance enacted by the Council of the City of Akron which regulates

. . . real property . . . or any interest therein on the basis of race, color, religion, national origin, or ancestry." Ordinances 873 and 926–1964 do not regulate real property on the basis of race, color, religion, national origin or ancestry, but simply attempt to give plaintiff-relator, and others similarly situated a means of redress when real property is attempted to be dealt with in the City of Akron on such irrational bases.

(c) Section 137 deals only with ordinances which "regulate" on the basis of race, etc. 873 and 926–1964 "prohibit" dealing with real property on the basis of race, etc., and the word regulate does not ordinarily include prohibit. Therefore, 873 and 926–1964 are not included within the ambit of Section 137.

(d) Section 137 is void and does not suspend the operation of 873 and 926–1964 because Section 137 is violative of equal protection and due process of the laws under the XIV Amendment to the Constitution of the United States of America for the following reasons:

(1) Section 137 was enacted with the sole purpose, intent and effect of preserving and reinforcing racial segregation in housing.

(2) Section 137 is the only Charter Amendment in the City of Akron which purports to bar City Council from effectively legislating in an area which otherwise is a proper subject of Municipal legislation. As such, Section 137 places a special disability on the enactment of anti-discrimination legislation in housing, whereas legislation in no other area is subject to such an impediment.

(3) Respondents have adopted the inconsistent position that various ordinances of the City of Akron committing the city to a prohibition of racial dis-

crimination in housing under the Federal Urban Renewal Programs are valid, although Ordinance 873/926–1964 which also prohibits racial discrimination has no validity because of Section 137. The adoption of this position by Respondents arbitrarily and discriminatorily deprives the plaintiff and other persons similarly situated of the right to protection in the general housing market, while persons involved in the various Federal Urban Renewal Programs are assured of such protection by the City of Akron. This is in spite of the fact that ordinances intending to protect both groups against racial discrimination were enacted by City Council with exactly the same procedure and none of these ordinances was approved by the voters of the City of Akron as seemingly called for by Section 137.

(4) Section 137 is violative of due process in that the means employed, conferring upon the electorate the right to approve an ordinance within the ambit of Section 137, does not bear a reasonable relationship to any legitimate governmental objective.

(e) Article I, Section 1, of the Constitution of the State of Ohio adopted March 10, 1851, and now in effect, reads insofar as pertinent as follows: "All men . . . have certain inalienable rights among which are those . . . of acquiring . . . property." Ordinances 873 and 926–1964 are recognitions of this constitutional right by the Council of the City of Akron, and together constitute an attempt to provide an effective method of implementation of these rights. As such, they are of so fundamental a nature that they may not be overturned by a vote of the electorate. When the voters attempted to do so, it was an attempt to render unenforceable that right given by the Constitution of Ohio, the supreme law of the State.

Reply

(f)

(1) Section 137 is an attempt to confer upon the electorate the right to approve ordinances regulating property on the basis of race prior to such an ordinance becoming effective. Section 137 was proposed by initiative petition. Section XVII of the Charter of the City of Akron provides insofar as relevant as follows:

> "Ordinances and Resolutions providing for the exercise of any and all powers of government granted by the Constitution or now delegated or hereafter delegated to Municipal Corporations by the General Assembly may be proposed by initiative petition."

Because of the supremacy of the Federal Constitution, neither the Constitution of the State of Ohio nor the General Assembly could delegate to Municipal Corporations any power of government which would regulate property on the basis of race. The initiative petitions supposedly putting Section 137 on the ballot are, therefore, beyond the legitimate scope of the initiative petition power conferred by Section XVII of Akron's Charter.

(2) The Constitution of the State of Ohio adopted in 1851 in Article II, Section 1 f, reads as follows:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action."

In the same fashion that Section 137 is beyond the scope of Akron's Charter, Section XVII, it is also beyond the scope of the "questions" referred to in

Article II, Section 1 f of the Constitution of the State of Ohio, since no municipality may now or hereafter be authorized by law to regulate property on the basis of race.

(g) The Ohio Constitution Article XVIII, Section 3, confers upon municipalities the right to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations not in conflict with general law. Section 137 is, therefore, valid only if within the ambit of Article XVIII, Section 3, of the Ohio Constitution. Akron does not have and could not have, because of the XIV Amendment to the Constitution of the United States, the power to regulate property on the basis of race. Section 137 is, therefore, beyond any "power of local self-government" or other law "not in conflict with general laws".

(h) 42 U.S.C. Section 1982 reads as follows:

> "All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

It was found by the Council of the City of Akron that non-white citizens of Akron do not have the same right to purchase real property as is enjoyed by white citizens of Akron (see the whereas clauses to Ordinance 873). Council used its best judgment to attempt to implement for Akron's non-white citizens the same right. Section 137 attempts to negate Council's procedural devices. Section 137, however, is in conflict with 42 U.S.C. Section 1982 and because of the supremacy clause is a nullity.

BERNARD R. ROETZEL and
NORMAN PURNELL,
Attorneys for Plaintiff-Relator.

(Verification)

Stipulation

(Title Omitted in Printing)

(Filed: Court of Appeals, Summit Co., Sept. 16, 1966.)

It is hereby stipulated between plaintiff and defendants subject to the right of any party to object to any stipulated matter subsequently at trial as to relevancy, materiality and competency, as follows:

1. Plaintiff-relatrix is a citizen of Akron, Ohio and therefore, one of the persons for whose benefit Ordinances 873-1964 and 926-1964 were enacted to protect against unfair housing practices caused by discrimination on the basis of race, color, religion, national origin or ancestry.

2. On the 26th and 27th of January 1965 the Mayor and members of the Commission were served with a copy of an Affidavit alleging that, among other things, in her efforts to locate desirable housing, relatrix was discriminated against because of her race, color and ancestry.

3. The Commission has not fully organized itself; it does not have a permanent Chairman or other person authorized to call meetings; and it has not adopted rules and regulations which may be necessary to carry out the purposes and provisions of this Ordinance.

4. By Section 2 of the amended Ordinance the Commission is created in the office of the Mayor to effectuate the policy declared by Section 1 of the amended Ordinance.

5. The petitions which resulted in Section 137 being put on the ballot at the November 3, 1964 General Election were filed with the Clerk of Council of the City of Akron, August 25, 1964.

Stipulation

6. Section 19 of the Charter of the City of Akron at that time read as follows:

> SECTION 19. Referendum, How Ordered and When Held.
>
> When a petition signed by ten (10) per centum of the electors of the City shall have been filed with the Clerk of the Council within thirty days after an ordinance or resolution shall have been passed by the Council ordering that such ordinance or resolution be submitted to the electors of the City for their approval or rejection, and said petition is found to be sufficient by the Clerk of the Council, as hereinafter provided, the election officer, officers or board having control of elections in the City shall cause such ordinance or resolution to be submitted to the electors of the City for their approval or rejection at the next succeeding regular or general election in any year occurring subsequent to thirty days after the Clerk of the Council finds such petition or amended petition to be sufficient as hereinafter provided; provided, however, that such ordinance or resolution may be submitted to the qualified electors of the City at a special election instead of a regular or general election, provided that thirty days' notice is given by the Council and such election is regularly called by the Council in the manner provided by law. No such ordinance shall go into effect until and unless approved by the majority of those voting upon the same. Nothing in this article shall prevent the City, after the passage of any ordinance or resolution from proceeding at once to give any notice or make any publication required by such ordinance or resolution.

Stipulation

7. The attached Charter is a true and accurate version of the City's Charter, as it existed at all times material hereto.

BERNARD R. ROSTEEL and
NORMAN PURNELL,
Attorneys for Plaintiff-Relatrix.

ALVIN C. VINOPAL,
Assistant Director of Law, City of Akron,
Attorney for Defendant-Respondents.

Charter, Annexed to Foregoing Stipulation

THE CHARTER

OF THE

CITY OF AKRON

OHIO

AMENDED TO

NOVEMBER 5, 1963

• • •

CORPORATE POWERS, RIGHTS, AND PRIVILEGES

SECTION 1. NAME, BOUNDARIES, AND POWERS.

The inhabitants of the City of Akron, as its limits now are, or may hereafter be, shall be a body politic and corporate by name The City of Akron, and as such shall have perpetual succession; may use a corporate seal; may sue and be sued; may acquire property in fee simple or lesser interest or estate by purchase, gift, devise, appropriation, lease, or lease with privilege to purchase, for any municipal purpose; may sell, lease, hold, manage and control such property and make any and all rules and regulations by ordinance or resolution which may be required to carry out fully all the provisions of any conveyance, deed, or will, in relation to any gift or bequest, or the provisions of any lease by which it may acquire property; may acquire, construct, own, lease and operate and regulate public utilities; may assess, levy and collect taxes for general and special purposes on all the subjects or objects which the City may lawfully tax under the provisions of this Charter; may levy and collect assessments for local improvements; may borrow money on the faith and credit of the City by the issue or sale of bonds or notes of the City; may appropriate the money of the City for all purposes lawful under the provisions of this Charter; may

create, provide for, construct, regulate and maintain all things of the nature of public works and improvements; may license and regulate persons, corporations and associations engaged in any business, occupation, profession or trade; may define, prohibit, abate, suppress and prevent all things detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the City, and all nuisances and causes thereof; may do all things necessary to promote the health, convenience, comfort and welfare of its citizens and advance the moral, social, physical and intellectual standard of its citizenship, and for such purposes it may exercise any or all of the power conferred in this section; may regulate and limit the height and bulk of buildings hereafter erected, and may regulate and prescribe the construction and the material used in all buildings, and the maintenance and occupancy thereof and regulate and determine the area of yards, courts, and other open places, and may divide the City into districts of such number, space and area as may be deemed best suited to carry out these purposes; may regulate and restrict the location of trades and industries, and the location of buildings designed for specified uses, and may divide the City into districts of such number, shape and area as may be deemed best suited to carry out these purposes; may regulate and control the use, for whatever purposes, of the streets and other public places; may create, establish, abolish and organize offices and fix the salaries and compensations of all officers and employees; may make and enforce local police, sanitary and other regulations; may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the City, and for the performance of the functions thereof. The City shall have all powers that now are, or hereafter may be granted to municipalities by the Constitution or laws of Ohio; and all powers, whether expressed or implied,

shall be exercised and enforced in the manner prescribed by this Charter, or when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the Council, and when not prescribed by this Charter or amendments thereto, or ordinance of Council, then said powers shall be exercised in the manner prescribed by the State law.

SECTION 2. ENUMERATED POWERS NOT EXCLUSIVE.

The enumeration of particular powers by this Charter shall not be held or deemed to be exclusive, but, in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the City shall have and may exercise all other powers which, under the Constitution and laws of Ohio, it would be competent for this Charter specifically to enumerate.

* * *

INITIATIVE AND REFERENDUM

SECTION 17. MANNER OF EXERCISE OF INITIATIVE.

Ordinances and resolutions providing for the exercise of any and all powers of government granted by the Constitution or now delegated or hereafter delegated to municipal corporations by the General Assembly, may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than seven (7) per centum of the electors of the City. The full text of the proposed ordinance or resolution shall be set forth in such initiative petition. Intiative petitions shall be filed with the Clerk of the Council. The proposed ordinance or resolution shall be submitted for the approval or rejection of the electors of the City at the next succeeding regular or general election occurring subsequent to thirty days after such initiative petition or amended petition is found to be sufficient by the

Clerk of the Council as hereinafter provided. Any ordinance or resolution proposed by initiative petition may also be submitted to the qualified electors of the City at a special election instead of a regular or general election, provided that thirty days' notice is given by the Council and such election is regularly called by the Council in the manner provided by law.

SECTION 18. WHEN ORDINANCES AND RESOLUTIONS SHALL BECOME EFFECTIVE.

No ordinance or resolution shall go into effect until thirty days after it shall have been passed by the Council, except as hereinafter provided.

SECTION 19. REFERENDUM, HOW ORDERED AND WHEN HELD.

When a petition signed by ten (10) per centum of the electors of the City shall have been filed with the Clerk of the Council within thirty days after an ordinance or resolution shall have been passed by the Council ordering that such ordinance or resolution be submitted to the electors of the City for their approval or rejection, and said petition is found to be sufficient by the Clerk of the Council, as hereinafter provided, the election officer, officers or board having control of elections in the City shall cause such ordinance or resolution to be submitted to the electors of the City for their approval or rejection at the next succeeding regular or general election in any year occurring subsequent to thirty days after the Clerk of the Council finds such petition or amended petition to be sufficient as hereinafter provided; provided, however, that such ordinance or resolution may be submitted to the qualified electors of the City at a special election instead of a regular or general election, provided that thirty days' notice is given by the Council and such election is regularly called by the Council in the manner provided by law. No such

ordinance shall go into effect until and unless approved by the majority of those voting upon the same. Nothing in this article shall prevent the City, after the passage of any ordinance or resolution, from proceeding at once to give any notice or make any publication required by such ordinance or resolution.

SECTION 20. APPLICATION OF REFERENDUM.

Any ordinance or resolution passed by the Council shall be subject to referendum except as hereinafter provided. Whenever the Council is by law required to pass more than one ordinance or resolution to complete the legislation necessary to make and pay for any public improvement, the provisions of Section 17 to 26, inclusive, in this Charter shall apply only to the first ordinance or resolution required to be passed and not to any subsequent ordinances or resolutions relating thereto. Ordinances or resolutions providing for appropriations for the current expenses of the City, or for street improvements petitioned for by the owners of the majority of the feet front of the property benefited and to be specially assessed for the cost thereof, and emergency ordinances or resolutions necessary for the immediate preservation of the public peace, health or safety shall go into immediate effect, or at the time stated in the ordinance. Such emergency ordinances or resolutions must, upon a "Yea" and "Nay" vote, receive the vote of two-thirds of all the members elected to the Council, and the reasons for such necessity shall be set forth in one section of the ordinance or resolution. If, when submitted to a vote of the electors, an emergency measure be not approved by a majority of those voting thereon, it shall be considered repealed as regards any further action thereunder, and all rights and privileges conferred by it shall be null and void; provided, however, that such measure so repealed shall be deemed sufficient authority for any payment made or ex-

pense incurred in accordance with the measure previous to the referendum vote thereon. The provisions of Sections 17 to 26, inclusive, of this Charter shall apply to pending legislation provided for any public improvement.

SECTION 21. THE PETITION—REQUIREMENTS, CONSTRUCTION AND EFFECT OF ELECTION.

Any initiative or referendum petition may be presented in separate parts, but each part shall contain a full and correct copy of the title and text of the ordinance or resolution proposed or sought to be referred. Each signer of an initiative or referendum petition shall sign his name in ink or indelible pencil, Each signer of an initiative or referendum petition must be an elector of the City. With each signature shall be stated the place of residence of the signer, giving the street and number and ward and precinct. Each part of such petition shall contain the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of signers of such part of such petition, and shall state that, to the best of his knowledge and belief, each of the signatures contained on such part is the genuine signature of the person whose name it purports to be, and believes that such persons are electors of the City, and that they signed such petition with the knowledge of the contents thereof. The petitions and signatures upon such petitions shall be prima facie presumed to be in all respects sufficient. No ordinance or resolution submitted to the electors of the City, and receiving an affirmative majority of the votes cast thereon, shall be held ineffective or void on account of the insufficiency of the petitions by which such submission of the same shall have been procured; nor shall the rejection by a majority of the votes cast thereon of any ordinance or resolution submitted to the electors of the City be held invalid for such insufficiency. The basis upon which the

required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of Mayor at the last preceding election therefor.

SECTION 22. DUTIES OF CLERK OF COUNCIL.

Within ten days after the filing of any initiative or referendum petition the Clerk of the Council shall determine the sufficiency of such petition and attach thereto a certificate showing the result of his examination. If the Clerk shall certify that the petition is insufficient he shall set forth in the certificate the particulars in which the petition is defective and shall return a copy of the certificate to the person designated in such petition to receive it. Such initiative or referendum petition may be amended at any time within twenty days after the making of a certificate of insufficiency by the Clerk, by filing a supplementary petition. Within ten days after such petition is amended by filing a supplementary petition, the Clerk shall make like examination of the amended petition, and, if his certificate shall show the same to be still insufficient, he shall return it to the person designated in such petition to receive it without prejudice, however, to the filing of a new petition. If the Clerk of the Council shall determine that the petition or amended petition is sufficient, he shall at once submit the same with his certificate to the Council. The Council shall thereupon order that the ordinance or resolution proposed or sought to be referred be submitted to the qualified electors of the City for their approval or rejection at an election to be held as here prescribed. The Clerk of Council shall forthwith transmit a duly certified copy of such order to the Deputy State Supervisors of Elections of Summit County, Ohio, or their successors. The election authorities shall cause publication of notice and all arrangements to be made for holding such election, and the same shall be conducted and the result thereof returned and declared in all respects as are the results of general municipal elections.

SECTION 23. INITIATIVE AND REFERENDUM BALLOTS.

The ballots used when voting upon any measure proposed by initiative petition or referred by referendum petition shall state the title of the ordinance or resolution and shall also contain a statement in clear and concise language descriptive of the substance of such ordinance or resolution, and below such statements the two propositions, "For the Ordinance" (or Resolutions, as the case may be), and "Against the Ordinance" (or Resolution, as the case may be). Immediately at the left of each proposition there shall be a square in which, by making a cross (X) the voter may vote for or against the proposed measure. If a majority of the electors voting on any such measure shall vote in favor thereof, it shall thereupon become an ordinance or resolution of the City. The statement descriptive of the substance of the ordinance or resolution to be placed on the ballot shall be drawn by the Director of Law and by him furnished to the election authorities having charge of the printing of the ballots.

* * * *

SECTION 25. REFERENDUM NOT TO APPLY.

The following ordinances and measures shall not be subject to the referendum but shall go into effect either immediately or at the time indicated therein, as Council may determine:

(a) Annual appropriation ordinances. (b) Ordinances or resolutions providing for the approval or disapproval of appointments or removals and appointments or removals made by Council. (c) Actions by Council on the approval of official bonds. (d) Ordinances or resolutions providing for the submission of any proposition to the vote of the electors. (e) Ordinances providing for street improvements petitioned for by owners of a majority of the feet front of

the property benefited and to be specially assessed for the cost thereof.

SECTION 26. ENACTMENT OR REPEAL BY COUNCIL.

If at any time before an election is held, submitting an ordinance or resolution proposed by initiative petition, the Council shall pass such ordinance or resolution, then no such election shall be held. If at any time before an election is held, referring an ordinance by referendum petition for approval or rejection of the electors, the Council shall repeal such ordinance, then no such election shall be held.

THE COUNCIL

SECTION 27. CREATION OF THE COUNCIL.

There is hereby created a Council which shall have full power and authority, except as otherwise herein provided, to exercise all the powers which now are or may be hereafter conferred upon municipalites by the Constitution of Ohio, and all the powers conferred upon the City of Akron by this Charter, and any additional powers which have been or may be conferred upon municipalities by the General Assembly.

* * *

SECTION 34. PROCEDURE OF COUNCIL.

The Council shall act only by ordinance or resolution. The affirmative vote of the majority of the members elected to the Council shall be necessary to adopt any ordinance or resolution. The vote upon the passage of all ordinances and resolutions shall be taken by "Yeas" and "Nays" and entered upon the journal. Each proposed ordinance or resolution shall be introduced in written or printed form and shall not contain more than one subject, which shall be

clearly stated in the title; but general appropriation ordinances may contain the various subjects and accounts for which moneys are to be appropriated. The enacting clause of all ordinances passed by the Council shall be: "Be It Enacted by the Council of The City of Akron." The enacting clause of all ordinances submitted by initiative shall be: "Be It Enacted by the People of The City of Akron." No ordinance, unless it be declared an emergency measure, shall be passed until it has been read on three separate days or the requirement of reading on three separate days has been dispensed with by a vote of seven members of the Council.

Section 35. Emergency Measures.

The Council may, by two-thirds vote of its members, pass emergency measure (sic) to take effect at the time indicated therein. Emergency measures shall contain a section in which the emergency is set forth and defined. Ordinances appropriating money may be passed as emergency measures, but no measure making a grant, renewal or extension of a franchise or other special privilege, or regulating the rate to be charged for its services by any public utility, shall be so passed.

* * *

Section 136. Amendment.

Proposed amendments to this Charter may be submitted to the electors of the City by a vote of six members of the Council, and upon petitions signed by ten per centum of the electors of the City, setting forth any such proposed amendment prepared and filed with the Clerk of the Council in the manner and form prescribed herein for the submission of ordinances by initiative petition, such proposed amendment shall be so submitted by the Council. The percentage aforesaid shall be based upon the total vote cast at the last preceding general municipal election. The ordi-

nance providing for the submission of any such proposed amendment shall require that such proposed amendment be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the amendment at a special election to be called and held within the time aforesaid. The Clerk of the Council shall transmit to the Deputy State Supervisors of elections of Summit County, Ohio, or their successors, a duly authenticated copy of such ordinance forthwith upon its passage, and not less than thirty days prior to such election the Clerk of the Council shall mail a copy of such proposed amendment to each elector whose name appears upon the registration books of the last regular or general election held in the City. If such proposed amendment be approved by a majority of the electors voting thereon, it shall become a part of the Charter at the time fixed therein; and if no time be fixed therein, then it shall become a part of the Charter when the results of the official canvass of such election are announced.

SECTION 137. AMENDMENT.

(Regulation of Real Property Rights)

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisements, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Opinion of Court of Appeals

IN THE

COURT OF APPEALS

FOR SUMMIT COUNTY, OHIO

THE STATE ex rel. NELLIE HUNTER,
Plaintiff-Relator,

against

EDWARD O. ERICKSON, Mayor, etc., et al.,
Defendants-Respondents.

(DECIDED Feb. 8, 1967)

BRENNEMAN, *J.*

This original action in this court is brought by the relator seeking a writ of mandamus. The relator's petition requests an order of mandamus to direct the Mayor, and all other defendants, to process a complaint filed by relator with the Commission on Equal Opportunity in Housing, as provided in Ordinance Number 873-1964; and Section 6 of this ordinance as amended by Ordinance Number 926-1964.

A demurrer to the relator's petition was sustained by this court as a result of the rule announced in the case of Porter v. Oberlin, 1 Ohio St. 2d 143, which stated that Section 3 of the Oberlin ordinance (enforcement procedure) was unconstitutional. Following that rule, this court decided that Section 6 of the Akron ordinance (enforcement procedure) was unconstitutional (both sections being substantially the same), and sustained the demurrer of respondents as previously stated. The Supreme Court of Ohio, on an appeal from the sustaining of the demurrer, announced in 6 Ohio St. 2d 130 (this case) that Section 6

(enforcement procedure) of the Akron ordinance was constitutional and, by mandate, ordered the demurrer overruled. The matter is now before this court on its merits.

The factual situation of this case is not subject to controversy, as the facts are either stipulated or not denied in the pleadings.

On July 14, 1964, the Council of the City of Akron passed Ordinance Number 873-1964. On July 21, 1964, Section 6 of the ordinance was amended by passing Ordinance Number 926-1964. The amended ordinance prohibits discrimination in the sale or rental of houses, on the basis of race, color, religion, or national origin. The ordinance provided enforcement procedure and violation penalties. That portion of the ordinance providing for enforcement procedure establishes in the office of the Mayor of the City of Akron a commission to be appointed by the Mayor, whose duties are, in part, to receive and investigate complaints, hold hearings, and determine facts concerning complaints; and to seek conciliation of such complaints.

At the general election held November 3, 1964, a proposed amendment to the Charter of the city of Akron was submitted to the electorate, which amendment provided:

> "Section 137. (Regulation of Real Property Rights)
>
> "Any ordinance enacted by the Council of the City of Akron which regulates the use, sale, advertisement, transfer, listing, assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein."

Charter Section 137 was adopted by a majority vote of the electorate of the city of Akron, Ohio, at the general election held November 3, 1964.

The relator alleges that on January 26th and January 27th, 1965, the Mayor and members of the Commission on Equal Opportunity in Housing, of the city of Akron, were served with a complaint alleging that the relator was discriminated against in her efforts to locate desirable housing, and that the respondents refused, and continue to refuse, to process her complaint, as provided by Ordinance Numbers 873-1964 and 926-1964 of the city of Akron.

On February 3, 1965, the relator filed a petition seeking a writ of mandamus to compel performance by the respondents of their official duties as provided in Ordinance Number 873-1964, and amended Ordinance Number 926-1964.

In answer to the petition of the relator, the respondents claim that Charter Amendment No. 137, as passed November 3, 1964, bars a cause of action predicated on the two ordinances relied upon by the relator for an order in mandamus to force the Commission on Equal Opportunity in Housing to process her complaint.

One question is thus raised by all of the pleadings: Is Charter Amendment No. 137 as passed a valid enactment, and not in conflict with the general laws of the land?

The relator contends the enactment of Charter Amendment No. 137 is invalid because:

1. It exceeds the authority conferred by the Ohio Constitution, Article II, Section 1f, and Article XVIII, Section 3; and the Akron Charter, Section 17 (initiative).

2. It is in contravention of rights secured by the Ohio Constitution, Article I, Section 1. (referendum).

3. It was not validly enacted in that it did not comply with Section 19 of the Akron Charter

4. It denies equal protection as set forth in the XIV Amendment to the Constitution of the United States.

5. It does not repeal Ordinances 873-1964 and 926-1964, because the ordinances are prohibitive, and the amendment applies only to regulatory ordinances.

Article II, Section 1f, of the Constitution of Ohio, adopted in 1912, provides:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

There is no dispute concerning Section 17 of the Charter of the city of Akron providing procedure for initiative enactment of laws; and we do not here present the entire section verbatim.

The position of the relator is to the effect that Charter Amendment No. 137 is not an initiative enactment, but a referendum directed at Ordinances Numbers 873–1964 and 926–1964. The relator further says that Section 19 of the Charter of the city of Akron (referendum procedure should have been followed, but instead Section 17 (initiative procedure) was followed.

We are of the opinion that the initiative petitions submitting Amendment No. 137 to the Charter of the city of Akron were proper; that the amendment was not directed to any specific legislation named therein (none was men-

tioned), and only the subject matter itself (all legislation regulating "* * * the use, sale * * * of real property * * *") was submitted to the electorate.

It is true that Amendment No. 137 repeals Ordinances Numbers 873–1964 and 926–1964; but it also repeals *all other* ordinances regulating "the use, sale * * * of real property * * * on the basis of race, color, religion, national origin or ancestry * * *", if any there be. It cannot be said that it is directed to a specific ordinance when it is directed to all ordinances of the same class. It repeals Ordinances Numbers 873–1964 and 926–1964 only because they fall within the class of legislation, not by reason of any specific direction in the amendment.

The relator cites to this court the case of State, ex rel. Smith vs. City of Fremont, 116 Ohio St. 469, as authority that initiative legislation cannot be used as a substitute for referendum. As pointed out in the brief of counsel, that case was overruled in the learned opinion of Judge Zimmerman in the case of State, ex rel. Sharpe vs. Hitt, Auditor, 155 Ohio St. 529. A careful reading of that opinion is aptly summed up in paragraph 3 of the syllabus:

> "The electors of a municipality may by the initiative enact a measure conflicting with or repealing legislation previously passed by the municipal council, so long as the subject matter of such initiative ordinance is within the powers of the municipality to control by legislative procedure."

Further, it may be stated that even though this was a charter amendment, and not an enactment of an ordinance, it is also permissible, in the opinion of this court, for it has been determined in the case of City of Youngstown vs. Craver, et al., Board of Elections, etc., 127 Ohio St. 195; 187 N.E. 715, that a city charter may be abolished by the

initiative. It is logical to assume that if a city charter may be abolished by this method, it may also be amended by the same method.

Was Charter Amendment No. 137 authorized by law and subject to control by legislative action, as set forth in Article II, Section 1f, of the Constitution of Ohio?

Has Article I, Section 1, of the Constitution of Ohio, granting to Ohio citizens the inalienable right of "acquiring * * * property" been violated by Charter Amendment No. 137?

Is Charter Amendment No. 137 in conflict with the Fourteenth Amendment to the Constitution of the United States?

We have answered the first question in the affirmative, for the reasons stated, and the authorities cited.

As to the second and third questions, both Section 1 of Article I of the Ohio Constitution, and the Fourteenth Amendment to the Constitution of the United States, grant to citizens the right to acquire and possess property. This is fundamental law, and it is not necessary to cite authorities, either in Ohio or throughout the land, upholding this right.

We must look to Charter Amendment No. 137 (previously set out in full in this opinion), to determine the question of conflict with, or denial of, the rights granted.

Charter Amendment No. 137 says, in effect, that any ordinance *regulating* the "use, sale * * * of real property * * * on the basis of race, color, religion, national origin or ancestry * * * " cannot be passed by the Council of the city of Akron, but must be submitted to the electorate for passage and adoption.

It does not deny the rights granted to everyone to acquire and possess property. All rights granted the citizens of Akron to acquire and possess property are retained. It denies the Council of the city of Akron the power to pass legislation regulating the "use, sale * * * of real property"

when the basis of that legislation is predicated upon "race, color, religion, national origin or ancestry". It retains the power to pass such regulatory legislation in the people from whom all powers, including those of the council of the city of Akron, originate. It limits the ways in which such legislation may be passed. It does not deny the people the opportunity to pass it. Such limitation of power in the legislative branch of government is not a denial of a right. It is a procedural matter, so long as the right to legislate is not denied the people.

We are not called upon to decide legislation denying our citizens their rights to acquire and possess property. We are required only to determine if legislative powers may be retained in the people, as opposed to a legislative body, i.e., the council of the city of Akron, insofar as Charter Amendment No. 137 is concerned.

We determine that Charter Amendment No. 137 is a valid enactment, not in conflict with constitutional authority, either State or Federal.

For the reasons stated, we find that Charter Amendment No. 137 repeals Ordinances Numbers 873–1964 and 926–1964, of the City of Akron.

We further conclude that no law now exists, nor did any law exist on February 3, 1965, upon which the petitioner may predicate an action for a writ of mandamus; that the question is moot, and the petition of the relator must be denied.

Writ denied.

DOYLE, P.J., and HUNSICKER, J., concur.

Journal Entry

IN THE

COURT OF APPEALS

FOR SUMMIT COUNTY, OHIO

STATE ex rel. NELLIE HUNTER,
Plaintiff-Relator,

against

EDWARD O. ERICKSON, Mayor, etc., et al.,
Defendants-Respondents.

(Filed: Court of Appeals, Summit Co., April 11, 1967)

This day this matter came on to be heard upon the pleadings, stipulations and arguments of Plaintiff-Relator and Defendants-Respondents, and upon consideration thereof it is ORDERED, ADJUDGED AND DECREED:

1. What is referred to in the pleadings as Charter Amendment Number 137 was validly enacted at the November, 1964 election, and it is not in conflict with constitutional authority, either State or Federal;

2. Charter Amendment Number 137 repealed Ordinances Numbers 873–1964 and 926–1964 of the City of Akron; and

3. Neither on January 26, January 27 or February 3, 1965 did any law exist nor does any law now exist upon which relator might predicate its action for a Writ of Mandamus, and the question raised by this lawsuit is therefore moot.

For the above reasons the writ sought is denied. Costs are taxed against Plaintiff-Relator.

MYRON T. BRENNEMAN,
Presiding Judge of the Court of Appeals.

Approved:

BERNARD R. ROETZEL–NORMAN PURNELL,
for Nellie Hunter.

ALVIN C. VINOPAL,
for the City of Akron.

Notice of Appeal

(Title Omitted in Printing)

(Filed: Court of Appeals, Summit Co., April 28, 1967)

Now comes the Plaintiff-Appellant and gives notice of appeal from the judgment entered in the Court of Appeals of Summit County, Ninth Judicial District, on the 11th day of April 1967, denying appellant herein a writ of mandamus as prayed for in her amended petition.

This is a case originating in the Court of Appeals.

This case involves a substantial constitutional question.

NORMAN PURNELL–BERNARD R. ROETZEL,
Attorneys for Appellant.

Opinion of the Supreme Court of Ohio

JANUARY TERM, 1967.

[12 Ohio St. 2d]

Statement of the Case.

THE STATE, EX REL. HUNTER, APPELLANT, v. ERICKSON, MAYOR, ET AL., APPELLEES.

[Cite as State, ex rel. Hunter, v. Erickson, 12 Ohio St. 2d 116.]

Municipal corporations—Local police regulations—Power to enforce includes power to prohibit—Ordinance regulating sale or rental of real property—On basis of race or religion—Charter amendment requiring approval by electors—Constitutional law.

1. The power given to municipalities by Section 3 of Article XVIII to adopt and enforce local police regulations includes the power by such regulations to prohibit. (Paragraph two of the syllabus of *West Jefferson* v. *Robinson*, 1 Ohio St. 2d 113, approved and followed.)

2. The charter of a municipal corporation may lawfully be amended to provide that any ordinance, which regulates the use, sale, advertisement, transfer, listing, assignment, lease, sublease or financing of real property on the basis of race, color, religion, national origin or ancestry, must first be approved by the electors of such municipality, and that any such ordinance in effect at the time of adoption of such a charter amendment shall cease to be effective until approved by such electors even though such voter approval is not required with respect to other kinds of ordinances.

(No. 41003—Decided December 27, 1967.)

APPEAL from the Court of Appeals for Summit County.

This action in mandamus was instituted in the Court of Appeals for Summit County on February 3, 1965. Relator alleges that she served upon respondents, the mayor and members of the Akron Commission on Equal Opportunity in Housing, "a copy of an affidavit, alleging * * * that in her efforts to locate desirable housing, relator was discriminated against because of her race, color, and ancestry," and that the commissioners "declined to process or handle" her complaint.

An Akron ordinance, passed and amended in July 1964, prohibits such discrimination, and provides in Section 6 thereof that "a complaint charging a violation of this ordinance may be made * * * by an aggrieved individual," and that "the commission shall make a prompt and full investigation of each complaint."

After providing for an answer to and a hearing on such a complaint, Section 6 of that ordinance provides further:

"(e) If upon all the evidence presented, the commission finds that the respondent has not engaged in any unlawful housing practice, it shall state its findings of fact, dismiss the complaint. If upon all the evidence presented the Commission finds that respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant.

"(f) In the event the respondent fails to comply with any order issued by the commission, it shall certify the case and the entire record of its proceedings to the city Director of Law for appropriate action to secure enforcement of the commission's order."

The Court of Appeals sustained the demurrer of respondents and denied the writ.

In so holding, the Court of Appeals followed that part of the decision of this court in *Porter* v. *Oberlin* (1965), 1 Ohio St. 2d 143, 205 N. E. 2d 363, which was based upon Judge Guernsey's concurring opinion and which had held invalid (by a vote of 4 to 3) provisions similar to those in Section 6 of the Akron ordinance. However, because one of the members of this court, who had agreed with that part of

the decision in *Porter* v. *Oberlin, supra,* concluded that the respondents had no standing to question the validity of Section 6 of the Akron ordinance, this court by a vote of four to three reversed the judgment of the Court of Appeals. See *State ex rel. Hunter* v. *Erickson,* 6 Ohio St. 2d 130, 216 N. E. 2d 371.

On remand to that court, respondents filed an answer alleging that the voters of Akron had, in November 1964, adopted Section 137 as an amendment to the charter of Akron. That section reads:

"Any ordinance enacted by the council of the city of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein."

Thereafter, relator filed a reply, questioning the validity of that charter amendment, and the cause was submitted on the pleadings and stipulations.

The Court of Appeals held that the hereinbefore referred to ordinance ceased to be effective on adoption of the foregoing amendment to the Akron charter, and therefore its judgment denied relator a writ of mandamus.

The cause is before this court on appeal from that judgment.

Mr. Norman Purnell and *Mr. Berngrd R. Roetzel,* for appellant.

Mr. William R. Baird, director of law, and *Mr. Alvin C. Vinopal,* for appellees.

TAFT, *C.J.* It is first contended that the ordinance involved in the instant case is not, within the meaning of Section 137 of the Akron Charter, one "which regulates," because it prohibits certain acts, including the discrimina-

tion against relator that is alleged in the petition. However, as stated in paragraph two of the syllabus of *West Jefferson* v. *Robinson* (1965), 1 Ohio St. 2d 113, 205 N.E. 2d 382: "The power given to municipalities by Section 3 of Article XVIII to adopt and enforce local police regulations includes the power by such regulations to prohibit." Actually, it did not include that power, there would be a very serious question as to whether the prohibitory parts of the ordinance that are relied upon by relator ever had any validity, notwithstanding our holding in *Porter* v. *Oberlin, supra* (1 Ohio St. 2d 143), that similar prohibitory parts of the ordinance there involved were valid.

It is obvious therefore that, if Section 137 of the Akron Charter is valid, its words require the conclusion that the ordinance relied upon by relator has ceased to be effective. Admittedly, that ordinance was in effect when that charter section was adopted and that ordinance has never been approved by the electors.

Relator contends that Section 137 of the Akron Charter is invalid by reason of Article XIV of the Amendments to the Constitution of the United States. In support of this contention, relator relies upon *Reitman* v. *Mulkey* (1967), 387 U. S. 369, 18 L. Ed. 830, 87 S. Ct. 1627.

That case dealt with a state constitutional provision which prohibited the state or any agency of the state from denying, or limiting "the right of any person * * * to decline to sell, lease or rent * * * property to such person or persons as he, in his absolute discretion, chooses."

Obviously, Section 137 of the Akron Charter does not do this. Notwithstanding its provisions, the legislative authority of Akron may still enact legislation denying or limiting the so-called right referred to in the California constitutional provision, and such legislation would become effective on approval thereof by the electors of Akron.

Under Section 7 of Article XVIII of the Ohio Constitution, a municipality is specifically authorized to "frame and adopt or amend a charter for its government and" to "exercise thereunder all powers of local self-government."

It may reasonably be argued that the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States would prevent Akron by its charter from exercising thereunder powers of local self-government so as to require prior voter approval only with respect to the kind of ordinances described in Section 137 of its charter.

In our opinion, that constitutional provision would not prevent such a charter requirement, if we can reasonably conclude that ordinances of the kind described in Section 137 of the Akron Charter may reasonably require such a different treatment than other ordinances. In other words, the question is whether the classification of such ordinances, so as to require voter approval thereof instead of enabling them to become effective as do other ordinances, represents a reasonable classification. In our opinion, it does. Thus, as stated in the majority opinion in *Porter* v. *Oberlin, supra* (1 Ohio St. 2d 143), at 152:

"Certainly, a legislative body is not unreasonable because it elects to proceed slowly in such an emotionally involved field as race relations." See also *Chicago Real Estate Board* v. *Chicago* (1967), 36 Ill. 2d 530, 224 N.E. 2d 793.

Likewise, since all the legislative power of a municipality is inherent in its people (See Section 2, Article I and Article XVIII of the Ohio Constitution), they are not unreasonable because they elect to proceed slowly in that field.

Thus, our conclusion is that Section 137 of the Akron Charter does not conflict with Article XIV of the Amendments to the Constitution of the United States.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT and BROWN, *JJ.*, concur.

SCHNEIDER, *J.*, concurs in the judgment on the basis of Judge Guernsey's concurring opinion in *Porter* v. *Oberlin*, 1 Ohio St. 2d 143, at page 154.

Notice of Appeal to the Supreme Court of the United States

IN THE

SUPREME COURT OF THE STATE OF OHIO

No. 41003

THE STATE OF OHIO, EX REL. NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON, OHIO,

Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, RAY C. SHEPPARD, CITY DIRECTOR OF LAW, and KENNETH KOLLER, WILLIAM S. PARRY, MARTHA BIRNBAUM, ROBERT C. WILSON and CLIFFORD E. GATES, Constituting the Members of the Commission on Equal Opportunity in Housing,

Appellees.

I. Notice is hereby given that the State of Ohio, Ex Rel. Nellie Hunter, appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Ohio in this action entered on December 27, 1967.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Notice of Appeal to the Supreme Court of the United States

1. The Record on Appeal to the Supreme Court of Ohio in this case which includes:

Petition

Ordinance No. 873–1964—Exhibit A

Ordinance No. 926–1964—Exhibit B

Alternative Writ of Mandamus
Answer
Reply
Stipulation
Opinion
Journal Entry
Notice of Appeal

2. The decision of the Supreme Court of the State of Ohio entered on December 27, 1967 (12 Ohio St. 2d 116).

3. The Notice of Appeal to the Supreme Court of the United States and proof of service.

III. The following questions are presented by this appeal:

1. Does a city charter amendment which nullifies a pre-existing city fair housing ordinance guaranteeing the right to secure housing free from discrimination based upon race, color or creed until it is approved by a majority of the city's electors voting at a regular or special election deprive a Negro citizen attempting to assert her rights under the fair housing ordinance of due process of law and equal protection of law guaranteed by the FOURTEENTH AMENDMENT to the United States Constitution?

2. Does a city charter amendment which subjects only fair housing legislation to approval by the city's electors

voting at a regular or special election, but does not subject any other type of city legislation to this procedure violate the rights of Negro citizens to equal protection of law guaranteed by the FOURTEENTH AMENDMENT to the United States Constitution?

3. May a city, by charter amendment, consistent with the prohibitions against invidious racial classifications contained in the FOURTEENTH AMENDMENT to the United States Constitution only limit the police power of its legislative body in the area of protecting citizens against racial discrimination and only nullify all pre-existing ordinances prohibiting discrimination until voter approval is obtained?

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BERNARD R. ROETZEL
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ROBERT L. CARTER
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Attorneys for Appellant
By ROBERT L. CARTER

Order

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1967

State, ex rel. Nellie Hunter, etc.,

Appellant,

v.

Edward O. Erickson, Mayor of the City of Akron, etc.

Upon Consideration of the application of counsel for appellant,

It Is Ordered that the time for filing an appeal in the above-entitled case under Rule 13 be, and the same is hereby, extended to and including April 25, 1968.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 18th day of March, 1968.

Probable Jurisdiction Noted—June 3, 1968

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1359, October Term, 1967

STATE OF OHIO, ex rel. NELLIE HUNTER,

Appellant,

against

EDWARD O. ERICKSON, etc., et al.,

Appellees.

In this case probable jurisdiction is noted and the case is placed on the summary calendar.

IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 63

THE STATE OF OHIO, EX REL, NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON,
Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*

ON APPEAL FROM THE SUPREME COURT OF OHIO.

STATEMENT AS TO JURISDICTION

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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

THE STATE OF OHIO, EX REL, NELLIE HUNTER,
ON BEHALF OF THE CITY OF AKRON,
Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE
CITY OF AKRON, *et al.*

ON APPEAL FROM THE SUPREME COURT OF OHIO.

STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment of the Supreme Court of the State of Ohio, entered on December 27, 1967, affirming the judgment of the Court of Appeals for the 9th Judicial District which held that Section 137, an amendment to the Charter of the City of Akron adopted by a majority vote of the city electorate on November 3, 1964, was consistent with the constitution and laws of Ohio and with the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Ohio, attached hereto as Appendix A, is reported at 12 Ohio St. 2d 116, 233 N.E. 2d 129. The decision of the Court of Appeals for the 9th Judicial District, attached hereto as Appendix B, is not yet reported.

Jurisdiction

This case was brought pursuant to Chapters 733.56-733.59, 2731 and 2731.02, Ohio Revised Code, to secure a writ of mandamus requiring respondents to process, as provided in Ordinance No. 873-1964 (appended hereto as Appendix C) and Section 6 thereof, as amended by Ordinance No. 926-1964 (appended hereto as Appendix D), appellant's complaint of racial discrimination in her attempt to obtain housing accommodations in Akron, Ohio. Appellant's petition was dismissed by the Court of Appeals for the 9th Judicial District on February 8, 1967. That decision was affirmed by the Supreme Court of Ohio on December 27, 1967, on the grounds that Section 137, an amendment to the Charter of the City of Akron, had rendered the aforesaid ordinances ineffective and inoperative. A notice of appeal was filed in that court on March 16, 1968. Appellant was granted an extension of time in which to file this appeal to and including April 25, 1968, by order of Mr. Justice Stewart. The jurisdiction of the Supreme Court to review this decision on direct appeal is confirmed by Title 28, U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of this Court to review this judgment on direct appeal: *King Manufacturing Co.* v. *City Council of Augusta,* 277 U.S. 100, 114; *Jamison* v. *Texas,* 318 U.S. 413, 414; *Independent Warehouses* v. *Schelle,* 331 U.S. 70, 79; and *Poulos* v. *New Hampshire,* 345 U.S. 395, 402.

Statutes Involved

Ordinance No. 873-1964, Ordinance No. 926-1964, and Section 137 of the Charter of the City of Akron, Ohio, are set forth herein as Appendix C, D and E respectively.

Questions Presented

1. Does a city charter provision, nullifying a pre-existing city fair housing ordinance unless and until approved by a majority vote of the city electorate voting at a regular or general election, deprive appellant, seeking to assert her right not to be subjected to racial discrimination in her effort to securing housing, of due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Does a legislative provision which requires the approval by a majority vote of the city electorate of all ordinances regulating real property on racial, ethnic or religious grounds but makes no such requirement as to any other type of legislation, constitute an individuous racial classification within the meaning of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

3. Has the state, where a city charter effectuates a police power limitation so that governmental power to protect against racial discrimination is circumscribed and conditioned on approval of the city electorate, became so substantially involved in maintaining and perpetuating private racial discrimination as to offend guarantees of the Fourteenth Amendment?

Statement

The facts are not in dispute. On July 14, 1964, the Council of the City of Akron, Ohio, enacted fair housing legislation in the form of Ordinance No. 873-1964 (Appendix C). Pursuant thereto equality of opportunity in housing was promulgated as local public policy. The law declared that many of Akron's multi-racial population "live in circumscribed and segregated areas, under substandard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing." Such discrimination was found to be injurious to "public safety, public health and general welfare," was said to compel increased governmental costs, and to cause other forms of segregation and discrimination prohibited by the Constitution of the United States and by the laws and the policy of the State of Ohio and the City of Akron. The ordinance, approved on July 18, 1964, prohibited various forms of racial discrimination in the sale, rental and leasing of housing and established in the Mayor's office a Commission on Equal Opportunity in Housing to administer and enforce its provisions. Thereafter, on July 21, 1964, Section 6 was amended in the form of Ordinance No. 926-1964 (Appendix D) and approved on July 22, 1964.

On August 25, petitions were filed with the City Clerk which resulted in Section 137, proposed as an amendment to the city charter (Appendix E), being placed on the ballots at the general election on November 3, 1964. This provision was passed by the majority of the voters, and provides that any legislation enacted by the city council regulating "the use, sale, advertisement, transfer, listing assignment, lease, sub-lease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry" must first be approved by a majority vote of the city electorate at a

regular or general election before becoming effective. In addition, it was provided that any ordinance in effect at the time of the adoption of Section 137 would have no force or effect until approved by the voters as provided by that provision.

Appellant, a Negro woman, and for whose benefit it was conceded and stipulated that Ordinances Nos. 873-1964 and 926-1964 were enacted, on January 26 and 27, 1965 by affidavit, filed a complaint with the Mayor and the members of the Commission on Equal Opportunity in Housing, that in her effort to secure adequate housing she had been subjected to discrimination, in violation of aforesaid local laws. The commission, on January 30, refused and declined to process or handle appellant's complaint. Thereafter, on February 1, 1965, a similar demand was made upon the City Director of Law to institute mandamus proceedings seeking to compel the commission and the Mayor to enforce the ordinances. The city director refused to bring the requested action. On February 3, 1965, appellant instituted the present proceedings by filing an original petition for writ of mandamus in the Court of Appeals for the 9th Judicial District, pursuant to Chapter 733.56-733.59 and Chapter 2731 to 2731.02, Ohio Revised Code, seeking to compel performance by respondents, the Mayor and the Commission on Equal Opportunity in Housing, of their official duties as mandated by the two aforesaid ordinances. A demurer to the petition was sustained by the Court of Appeals for the 9th Judicial District. On appeal to the Supreme Court of Ohio, this decision was reversed. In effect, the Supreme Court of Ohio held that the fair housing ordinances in question were valid enactments and met state law requirements. See 6 Ohio St. 2d 130, 216 NE 2d 371 (1966).

On remand to the court of appeals, respondents filed an answer admitting the allegations of fact set out herein, but alleging that the adoption of Section 137 as an amendment to the city charter by the majority of the Akron

electorate at the November 3, 1964 general election had rendered the ordinances in question inoperative and ineffective. Appellant, in reply, challenged the validity of Section 137 on state procedural grounds and on the grounds that it constituted a violation of both the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. The cause was thereupon submitted to the court of appeals on the pleadings and stipulations.

On February 8, 1967, that court held Section 137 had been properly placed on the ballot on November 3, 1964; that its terms and enactment by the majority of the electorate were not at variance with either state or federal law, and that by its adoption the fair housing ordinances relied upon by appellant were no longer operative (Appendix B).[1]

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[1] The court held the procedure for placing Section 137 before the voters was that set forth in Chapter 17 (initiative) of the city charter and not, as appellant contended, that required by Section 19 thereof (referendum).

Section 17 is as follows:

Manner of Exercise of Initiative.

Ordinances and resolutions providing for the exercise of any and all powers of government granted by the Constitution or now delegated or hereafter delegated to municipal corporations by the General Assembly, may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than seven (7) per centum of the electors of the City. The full text of the proposed ordinance or resolution shall be set forth in such initiative petition. Initiative petitions shall be filed with the Clerk of the Council. The proposed ordinance or resolution shall be submitted for the approval or rejection of the electors of the City at the next succeeding regular or general election occurring subsequent to thirty days after such initiative petition or amended petition is found to be sufficient by the Clerk of the Council as hereinafter provided. Any ordinance or resolution proposed by initiative petition may also be submitted to the qualified electors of the City at a special election instead of a

The cause was appealed to the Supreme Court of Ohio, and the lower court judgment was affirmed in a decision entered on December 27, 1967 (Appendix A). The court

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regular or general election, provided that thirty days' notice is given by the Council and such election is regularly called by the Council in the manner provided by law.

Section 19 provides:

Referendum, How Ordered and When Held.

When a petition signed by ten (10) per centum of the electors of the City shall have been filed with the Clerk of the Council within thirty days after an ordinance or resolution shall have been passed by the Council ordering that such ordinance or resolution be submitted to the electors of the City for their approval or rejection, and said petition is found to be sufficient by the Clerk of the Council, as hereinafter provided, the election officer, officers or board having control of elections in the City shall cause such ordinance or resolution to be submitted to the electors of the City for their approval or rejection at the next succeeding regular or general election in any year occurring subsequent to thirty days after the Clerk of the Council finds such petition or amended petition to be sufficient as hereinafter provided; provided, however, that such ordinance or resolution may be submitted to the qualified electors of the City at a special election instead of a regular or general election, provided that thirty days' notice is given by the Council and such election is regularly called by the Council in the manner provided by law. No such ordinance shall go into effect until and unless approved by the majority of those voting upon the same. Nothing in this article shall prevent the City, after the passage of any ordinance or resolution from proceeding at once to give any notice or make any publication required by such ordinance or resolution.

The petition, pursuant to which Section 137 was placed before the voters in Akron at the November 3, 1964 election, was filed in the city clerk's office on August 25, 1964. If Section 19 controlled, the petition would have had to be filed within 30 days of the enactment of the fair housing ordinance. Thus the filing on August 25 would have been out of time. No such time limitation affects proceedings under Section 17. Section 17 requires the petition to be signed by 7% of the electorate while Section 19 requires 10% of the electorate as signatories.

distinguished this Court's decision in *Reitman v. Mulkey*, 378 U.S. 369. It said that in *Reitman* a state constitutional provision forbade any regulation of the individual freedom to sell, lease or rent real property, while here Section 137 placed no such absolute limitation on governmental authority. Further, the court stated that, while voter approval was necessary only in respect to legislation adopted by the city council which seeks to regulate the use, sale, rental or lease real property on racial and religious grounds, and that Section 137 was, therefore, class legislation, it constituted a reasonable classification under Ohio law and within the meaning of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Thereupon, appellant brings the cause here for review on appeal.

The Questions Are Substantial

1. Housing discrimination in Ohio, as is true throughout the United States, constitutes a major social problem. "Housing," *United States Commission on Civil Rights* (1961); "A Survey of Discrimination in Housing," *Ohio Civil Rights Commission* (Columbus, Ohio, 1964). Akron, one of the cities in which the Ohio Commission held public hearings, experienced a 217% growth in its Negro population between 1940-1960, the greatest in the state. As a result of the survey referred to above, the Ohio Civil Rights Commission found that the increased migration of Negroes to the urban areas of the state created a critical housing problem. Racial discrimination was said by the Ohio Civil Rights Commission to be the cause for the creation and expansion of black ghettos within the state's urban centers.[2]

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[2] See "A Survey in Discrimination in Housing," op. cit., *supra*, at pp. 16, 20.

Moreover, it was found that public and private costs of maintaining housing discriminatory practices were high; that "segregated residential patterns which typically cause overcrowding require additional expenditures for education, police and fire protection, and health and welfare services."[8]

Further, the commission came to the following conclusions as a result of its exploration of this problem:

> There are also high costs paid directly by individuals. Car insurance companies will charge more where the insured vehicle must be parked on a narrow street, where there are no garage facilities. Accidents occur more frequently there. A dual housing market exists, whereby residences in particular neighborhoods are not available to whole groups of persons because of racial or religious restrictions. The person desirous of selling his house does not have *all* potential buyers vying for the purchase, where discrimination in housing is practiced. With a reduced demand for his house, the seller may have to settle for a lower price. Similarly, the house buyer, regardless of race, will have fewer houses available for consideration if he searches a segregated market. The dual housing market tends to create higher housing costs to Negroes than to whites, with the result that a smaller percentage of the Negro's income is available for consumer spending. The detriment to the economy is obvious.
>
> In conclusion, there is a basic two-fold effect of discrimination and segregation in housing. First, it serves as a stimulant to prejudice and consequential further segregation. Second, it constitutes a major threat to the social and economic well-being of the community wherein it exists. The ramifications of this are evident in the area of education, crime and delinquency, health, welfare, and costs to local government, private agencies and individuals.
>
> The relationship between discrimination and segregation is that of a circle. Each is both the cause

[8] Id. at 36.

> and the effect of the other. Whereas the *act* of discriminating or segregating is the result of prejudicial attitudes, these same attitudes are reinforced, and at times fostered, by the *fact* of discrimination or segregation. Negroes invariably inhabit the least desirable housing facilities in any given city. The conclusion is too easily reached that any residential area occupied by Negroes will become a ghetto.[4]

In recognition of these adverse human, social and economic factors, Akron's city council enacted in July, 1964, a fair housing ordinance to insure equality of opportunity in housing and established a commission to enforce its terms (Appendix C, D). The legislation caused widespread discussion and public dispute. After it became law, petitions were circulated to amend the city charter so as to nullify the ordinance and to provide insurance against the enactment of future open housing legislation.

State involvement to any significant degree in the support, maintenance or encouragement of racial discrimination has been held by this Court under a variety of circumstances to constitute forbidden state action within the meaning of the 14th Amendment to the Constitution of the United States. See e.g. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Anderson* v. *Martin*, 375 U.S. 399; *Robinson* v. *Florida*, 378 U.S. 153; *Evans* v. *Newton*, 382 U.S. 296; *Reitman* v. *Mulkey*, 387 U.S. 369. Affirmative state action to forbid private discrimination is permissible and consistent with the objectives of the 14th Amendment. *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 94. However, while it may not be constitutionally mandated to proscribe private discrimination, a state cannot without running afoul of the guarantees of the 14th Amendment, directly or by indirection, undergird such discrimination, as is done here, so that it is in effect raised to the level of basic governmental pol-

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[4] Id. at pp. 37-38.

icy. It is respectfully submitted that this is the vice of Section 137 at issue on this appeal.

In *Reitman v. Mulkey, supra,* this Court held a California state constitutional provision, Article I, Section 26, enacted by the majority of the electorate voting in a general state-wide election, offensive to the 14th Amendment. This provision forbade the state from limiting the freedom and absolute discretion of any person to refuse to sell, lease or rent real property to any person he so desires. While the issues raised in this appeal are not in all particulars identical with those in *Reitman*, the differences are of degree and do not involve matters of substance or principle. The basic constitutional question is the same, and thus, it is respectfully submitted, *Reitman* v. *Mulkey* governs and controls disposition of this appeal.

Here, as in *Reitman,* fair housing legislation has not been merely repealed. Negroes, the main beneficiaries of equal housing legislation, and their allies in advocating enactment of such laws do not now have only the task of persuading a majority of the city council to adopt a new ordinance prohibiting racial discrimination. They are still required to do that, of course, but more still must be done. After having succeeded at the city council level, proponents of fair housing must now draft, distribute and file with the city clerk petitions calling for adoption of the legislation by the city electorate at the next regular or general election. These petitions must be signed by 10% of the city electorate and filed 30 days after the new ordinance is approved if Section 19 (referendum) of the city charter is applicable.[5] If Section 17 (initiative) applies, only 7% of the city electorate must sign the petitions, and the 30-day limitation does not apply.[6] Whichever of these two pro-

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[5] See op. cit., supra, note 1.

[6] See op. cit., supra, note 1.

visions is found to be controlling, it is clear that fair housing advocates have far more to do now than was true before November 3, 1964.

When the requisite petitions are filed, the matter is then submitted to the electorate by being placed on the ballot at the next regular or general election. Since these elections do not occur each year, if the ordinance is enacted by the council in a year when no regular or general election is scheduled, the petitions must wait a year or more before being submitted to final vote by the residents of the City of Akron. In such circumstances, proponents of fair housing legislation would be faced with another disability. The delay would allow time for counter-pressures to be brought on the council to persuade it to repeal the new ordinance before it is submitted to the voters. Then the process would have to be commenced all over again.

Provided the measure remains intact for submission to the electorate, a majority of the voters in Akron have to be convinced to vote in favor of fair housing before the ordinance can become law. Thus, hurdles against any future enacting of fair housing legislation in the City of Akron are presently considerably higher, and the prospects of success far dimmer than was the case before Section 137 became law. Indeed, Negroes are not only faced with the reality of not being able to muster sufficient strength by resort to the normal democratic process to obtain governmental protection against housing discrimination, but private discrimination in housing is now protected by the government and, therefore, has become in effect the public policy in the City of Akron. In short, what was condemned in *Buchanan* v. *Warley*, 245 U.S. 60; *Shelley* v. *Kraemer*, 334 U.S. 1; and *Barrows* v. *Jackson*, 345 U.S. 249 has now, pursuant to Section 137, become governmental policy in the City of Akron.

It is a fallacy to regard this, as did the court below, as a mere racially neutral decision by the people of Akron

that the regulation of housing on racial grounds is of such special importance that the legislative process in this area must be treated differently than in respect to other kinds of legislation. By majority vote, the electorate in Akron has enacted private racism into law and, as such, has deprived appellant and all other Negro residents of Akron of the protection afforded by the 14th Amendment.

By majority vote, the electorate of Akron repealed not only the fair housing ordinance but tied the government's hand so that it could never on its own initiative in the future successfully enact any such housing legislation. While Section 137 expresses the views of the majority of Akron's electorate, where majority rule violates the guarantees of the due process and equal protection clauses of the 14th Amendment, it cannot prevail. See *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410; *Brown* v. *Board of Education,* 347 U.S. 483; *Yick Wo* v. *Hopkins,* 118 U.S. 356. See Black, "The Supreme Court, 1966 Term, Foreword, 'State Action,' Equal Protection, and California's Proposition 14," *81 Har. L. Rev. 69* (1967).

The court below states that Section 137 (the city charter amendment nullifying the instant fair housing ordinance and requiring that such future legislation be directly approved by the city electorate) is not, as it describes Article 1, Section 26, of the California Constitution, struck down in *Reitman* v. *Mulkey,* 387 U.S. 369, an absolute prohibition against enactment of future fair housing legislation.

The California law was not an absolute prohibition against all future fair housing legislation. Equal housing laws could be enacted provided the difficult task of obtaining approval of a constitutional amendment repealing Article 1, Section 26, could be accomplished. What Section 137 does (as was true of California's Article 1, Section 26), however, is to stack the cards so heavily against the proponents of equal housing legislation as to make all but im-

possible the enactment of such legislation through the ordinary democratic process. A state cannot so limit its authority to protect against private racial discrimination as to become an active participant in the perpetuation of that discrimination. In so doing, the force and effect of its action is to make the discrimination state policy. See *Burton* v. *Wilmington Parking Authority, supra.* Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339. For the foregoing reasons, it is respectfully submitted that Section 137 is controlled by the decision of this Court in *Reitman* v. *Mulkey, supra,* and as such must be struck down.

2. That the primary purpose of the enactment of the 14th Amendment was to protect the newly-freed black citizen and his progeny from invidious differentiations and distinctions based upon race and color and not applicable to all other persons, was recognized at the very outset. See e.g., *The Slaughter-House Cases,* 16 Wall 36, 81; *Strauder* v. *West Virginia,* 100 U.S. 303, 306, 308. Although principally meant to guarantee full citizenship rights to Negroes, the 14th Amendment has been consistently construed by this Court as requiring that "equal protection and security should be given all under like circumstances in the enjoyment of their personal and civil rights." *Barbier* v. *Connolly,* 113 U.S. 27, 31. Thus, the 14th Amendment has become a shield for all citizens against unreasonable and arbitrary governmental action, and while states are permitted to do "a good deal of classifying that it is difficult to believe rational," *Nixon* v. *Herndon,* 273 U.S. 536, 541, such legislation or regulation must be based upon some real or substantial differences pertinent to a valid legislative objective. See *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 92; *Lindsley* v. *National Carbonic Gas Company,* 220 U.S. 61, 78-79; *Marchant* v. *Pennsylvania R. Co.,* 153 U.S. 380, 390; *Truax* v. *Raich,* 239 U.S. 33; *Skinner* v. *Oklahoma,* 316 U.S. 535; *Hernandez* v. *Texas,* 347 U.S. 475, 478; *Douglas* v. *California,* 372 U.S. 353, 356-357.

Racial classifications have never been totally outlawed by this Court but in evaluating their validity the 14th Amendment strictures are more rigidly applied. See *Nixon* v. *Herndon, supra.* Because racial classifications are "immediately suspect," *Korematsu* v. *United States,* 323 U.S. 214, 216, "odious to a free people," *Hirabayashi* v. *United States,* 320 U.S. 81, 100, and in most instances are "constitutionally an irrelevance," Mr. Justice Jackson concurring in *Edwards* v. *California,* 314 U.S. 180, 185, they are usually "beyond the pale," Mr. Justice Douglas, dissenting in *South* v. *Peters,* 339 U.S. 276, 278. Indeed, except in times of national peril, when the Court has been reluctant to substitute its judgment for that of the Chief Executive, *Hirabayashi* v. *United States, supra,* or where convinced that no invidious discrimination is being perpetrated, *Tancil* v. *Woolls,* 379 U.S. 19, racial classifications have generally been found to violate the basic guarantees of the 14th Amendment. See *Yick Wo* v. *Hopkins,* 118 U.S. 356; *Buchanan* v. *Warley, supra*; *Oyama* v. *California,* 332 U.S. 633; *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637; *Brown* v. *Board of Education,* 347 U.S. 483; *Anderson* v. *Martin, supra; Virginia Board of Elections* v. *Hamm,* 379 U.S. 19; *McLaughlin* v. *Florida,* 379 U.S. 184; *Loving* v. *Virginia,* 388 U.S. 1. It is not enough that a racial classification be reasonable, it must meet the heavy burden of justification by a showing of overriding circumstances that renders the classification necessary. See *McLaughlin* v. *Florida, supra.* If such racial distinctions are to be upheld, "they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving* v. *Virginia, supra,* at page 11.

In this instance, Section 137 puts the regulation of real property on racial grounds in a category distinct and separate from that of any other type of legislation. Where the

city council deems it appropriate to seek to protect against racial discrimination in housing, such legislation and such legislation only must be submitted to the voters of the city for approval. All other kinds of legislation become law by passage of the enactment by the city council and approval by the mayor. The court below, while correct in describing Section 137 as a legislative classification, went astray in not recognizing that the charter amendment as a racial classification must be evaluated by stricter standards in determining its constitutional validity, than is true in other types of classifications.

The only reason Section 137 was enacted and the very purpose it serves by placing legislation which seeks to regulate racial discrimination in housing directly subject to the vote of the electorate, was to insure that fair housing legislation would never be enacted. As such, it serves no permissible legislative objective apart from perpetuating racial discrimination which the Constitution condemns. Therefore, the test set forth in *McLaughlin* v. *Florida, supra,* and *Loving* v. *Virginia, supra,* has not been met and Section 137 must fall.

Conclusion

For the foregoing reasons, we submit, the questions presented by this appeal are substantial and raise issues of public importance which should be disposed of by this Court. Because *Reitman* v. *Mulkey*, *Loving* v. *Virginia*, and *McLaughlin* v. *Florida*, considered separately or together, control disposition of this appeal, we urge this Court to note probable jurisdiction and to reverse the judgment below on the authority of those cases without the necessity of oral argument.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Ohio
Decided December 27, 1967

TAFT, *C.J.* It is first contended that the ordinance involved in the instant case is not, within the meaning of Section 137 of the Akron Charter, one "which regulates," because it prohibits certain acts, including the discrimination against relator that is alleged in the petition. However, as stated in paragraph two of the syllabus of *West Jefferson* v. *Robinson* (1965), 1 Ohio St. 2d 113, 205 N.E. 2d 382: "The power given to municipalities by Section 3 of Article XVIII to adopt and enforce local police regulations includes the power by such regulations to prohibit." Actually, it did not include that power, there would be a very serious question as to whether the prohibitory parts of the ordinance that are relied upon by relator ever had any validity, notwithstanding our holding in *Porter* v. *Oberlin, supra* (1 Ohio St. 2d 143), that similar prohibitory parts of the ordinance there involved were valid.

It is obvious therefore that, if Section 137 of the Akron Charter is valid, its words require the conclusion that the ordinance relied upon by relator has ceased to be effective. Admittedly, that ordinance was in effect when that charter section was adopted and that ordinance has never been approved by the electors.

Relator contends that Section 137 of the Akron Charter is invalid by reason of Article XIV of the Amendments to the Constitution of the United States. In support of this contention, relator relies upon *Reitman* v. *Mulkey* (1967), 387 U. S. 369, 18 L. Ed. 830, 87 S. Ct. 1627.

That case dealt with a state constitutional provision which prohibited the state or any agency of the state from denying, or limiting "the right of any person * * * to decline to sell, lease or rent * * * property to such person or persons as he, in his absolute discretion, chooses."

Obviously, Section 137 of the Akron Charter does not do this. Notwithstanding its provisions, the legislative authority of Akron may still enact legislation denying or limiting the so-called right referred to in the California constitutional provision, and such legislation would become effective on approval thereof by the electors of Akron.

Under Section 7 of Article XVIII of the Ohio Constitution, a municipality is specifically authorized to "frame and adopt or amend a charter for its government and" to "exercise thereunder all powers of local self-government."

It may reasonably be argued that the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States would prevent Akron by its charter from exercising thereunder powers of local self-government so as to require prior voter approval only with respect to the kind of ordinances described in Section 137 of its charter.

In our opinion, that constitutional provision would not prevent such a charter requirement, if we can reasonably conclude that ordinances of the kind described in Section 137 of the Akron Charter may reasonably require such a different treatment than other ordinances. In other words, the question is whether the classification of such ordinances, so as to require voter approval thereof instead of enabling them to become effective as do other ordinances, represents a reasonable classification. In our opinion, it does. Thus, as stated in the majority opinion in *Porter* v. *Oberlin, supra* (1 Ohio St. 2d 143), at 152:

"Certainly, a legislative body is not unreasonable because it elects to proceed slowly in such an emotionally involved field as race relations." See also *Chicago Real Estate Board* v. *Chicago* (1967) 36 Ill. 2d 530, 224 N.E. 2d 793.

Likewise, since all the legislative power of a municipality is inherent in its people (See Section 2, Article I and Article XVIII of the Ohio Constitution), they are not unreasonable because they elect to proceed slowly in that field.

Thus, our conclusion is that Section 137 of the Akron Charter does not conflict with Article XIV of the Amendments to the Constitution of the United States.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT and BROWN, *JJ.*, concur.

SCHNEIDER, *J.*, concurs in the judgment on the basis of Judge Guernsey's concurring opinion in *Porter* v. *Oberlin*, 1 Ohio St. 2d 143, at page 154.

APPENDIX B

Opinion of Court of Appeals for the Ninth Judicial District of Ohio

BRENNEMAN, *J.*:

This original action in this court is brought by the relator seeking a writ of mandamus. The relator's petition requests an order of mandamus to direct the Mayor, and all other defendants, to process a complaint filed by relator with the Commission on Equal Opportunity in Housing, as provided in Ordinance Number 873-1964; and Section 6 of this ordinance as amended by Ordinance Number 926-1964.

A demurrer to the relator's petition was sustained by this court as a result of the rule announced in the case of Porter v. Oberlin, 1 Ohio St. 2d, 143, which stated that Section 3 of the Oberlin ordinance (enforcement procedure) was unconstitutional. Following that rule, this court decided that Section 6 of the Akron ordinance (enforcement procedure) was unconstitutional (both sections being substantially the same), and sustained the demurrer of respondents as previously stated. The Supreme Court of Ohio, on an appeal from the sustaining of the demurrer, announced in 6 Ohio St. 2d, 130 (this case) that Section 6 (enforcement procedure) of the Akron ordinance was constitutional and, by mandate, ordered the demurrer overruled. The matter is now before this court on its merits.

The factual situation of this case is not subject to controversy, as the facts are either stipulated or not denied in the pleadings.

On July 14, 1964, the Council of the City of Akron passed Ordinance Number 873-1964. On July 21, 1964, Section 6 of the ordinance was amended by passing Ordinance Number 926-1964. The amended ordinance prohibits discrimination in the sale or rental of houses, on the basis of

race, color, religion, or national origin. The ordinance provided enforcement procedure and violation penalties. That portion of the ordinance providing for enforcement procedure establishes in the office of the Mayor of the City of Akron a commission to be appointed by the Mayor, whose duties are, in part, to receive and investigate complaints, hold hearings, and determine facts concerning complaints; and to seek conciliation of such complaints.

At the general election held November 3, 1964, a proposed amendment to the Charter of the city of Akron was submitted to the electorate, which amendment provided:

> "Section 137. (Regulation of Real Property Rights)
>
> "Any ordinance enacted by the Council of the City of Akron which regulates the use, sale, advertisement, transfer, listing, assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein."

Charter Section 137 was adopted by a majority vote of the electorate of the city of Akron, Ohio, at the general election held November 3, 1964.

The relator alleges that on January 26th and January 27th, 1965, the Mayor and members of the Commission on Equal Opportunity in Housing, of the city of Akron, were served with a complaint alleging that the relator was discriminated against in her efforts to locate desirable housing, and that the respondents refused, and continue to

refuse, to process her complaint, as provided by Ordinance Numbers 873-1964 and 926-1964 of the city of Akron.

On February 3, 1965, the realtor filed a petition seeking a writ of mandamus to compel performance by the respondents of their official duties as provided in Ordinance Number 873-1964, and amended Ordinance Number 926-1964.

In answer to the petition of the relator, the respondents claim that Charter Amendment No. 137, as passed November 3, 1964, bars a cause of action predicated on the two ordinances relied upon by the relator for an order in mandamus to force the Commission on Equal Opportunity in Housing to process her complaint.

One question is thus raised by all of the pleadings: Is Charter Amendment No. 137 as passed a valid enactment, and not in conflict with the general laws of the land?

The relator contends the enactment of Charter Amendment No. 137 is invalid because:

1. It exceeds the authority conferred by the Ohio Constitution, Article II, Section 1f, and Article XVIII, Section 3; and the Akron Charter, Section 17 (initiative).

2. It is in contravention of rights secured by the Ohio Constitution, Article I, Section 1.

3. It was not validly enacted in that it did not comply with Section 19 of the Akron Charter (referendum).

4. It denies equal protection as set forth in the XIV Amendment to the Constitution of the United States.

5. I does not repeal Ordinances 873-1964 and 926-1964, because the ordinances are prohibitive, and the amendment applies only to regulatory ordinances.

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Article II, Section 1f, of the Constitution of Ohio, adopted in 1912, provides:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

There is no dispute concerning Section 17 of the Charter of the city of Akron providing procedure for initiative enactment of laws; and we do not here present the entire section verbatim.

The position of the relator is to the effect that Charter Amendment No. 137 is not an initiative enactment, but a referendum directed at Ordinances Numbers 873-1964 and 926-1964. The relator further says that Section 19 of the Charter of the city of Akron (referendum procedure) should have been followed, but instead Section 17 (initiative procedure) was followed.

We are of the opinion that the initiative petitions submitting Amendment No. 137 to the Charter of the city of Akron were proper; that the amendment was not directed to any specific legislation named therein (none was mentioned), and only the subject matter itself (all legislation regulating "* * * the use, sale * * * of real property * * *") was submitted to the electorate.

It is true that Amendment No. 137 repeals Ordinances Numbers 873-1964 and 926-1964; but it also repeals *all other* ordinances regulating "the use, sale * * * of real property * * * on the basis of race, color, religion, national origin or ancestry * * *", if any there be. It cannot be said that it is directed to a specific ordinance when it is directed to all ordinances of the same class. It repeals Ordinances

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Numbers 873-1964 and 926-1964 only because they fall within the class of legislation, not by reason of any specific direction in the amendment.

The relator cites to this court the case of State, ex rel. Smith vs. City of Fremont, 116 Ohio St. 469, as authority that initiative legislation cannot be used as a substitute for referendum. As pointed out in the brief of counsel, that case was overruled in the learned opinion of Judge Zimmerman in the case of State, ex rel. Sharpe vs. Hitt, Auditor, 155 Ohio St. 529. A careful reading of that opinion is aptly summed up in paragraph 3 of the syllabus:

> "The electors of a municipality may by the initiative enact a measure conflicting with or repealing legislation previously passed by the municipal council, so long as the subject matter of such initiative ordinance is within the powers of the municipality to control by legislative procedure."

Further, it may be stated that even though this was a charter amendment, and not an enactment of an ordinance, it is also permissible, in the opinion of this court, for it has been determined in the case of City of Youngstown vs. Craver, et al., Board of Elections etc., 127 Ohio St. 195; 187 N.E. 715, that a city charter may be abolished by the initiative. It is logical to assume that if a city charter may be abolished by this method, it may also be amended by the same method.

Was Charter Amendment No. 137 authorized by law and subject to control by legislative action, as set forth in Article II, Section 1f, of the Constitution of Ohio?

Has Article I, Section 1, of the Constitution of Ohio, granting to Ohio citizens the inalienable right of "acquiring * * * property" been violated by Charter Amendment No. 137?

Is Charter Amendment No. 137 in conflict with the

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Fourteenth Amendment to the Constitution of the United States?

We have answered the first question in the affirmative, for the reasons stated, and the authorities cited.

As to the second and third questions, both Section 1 of Article I of the Ohio Constitution, and the Fourteenth Amendment to the Constitution of the United States, grant to citizens the right to acquire and possess property. This is fundamental law, and it is not necessary to cite authorities, either in Ohio or throughout the land, upholding this right.

We must look to Charter Amendment No. 137 (previously set out in full in this opinion), to determine the question of conflict with, or denial of, the rights granted.

Charter Amendment No. 137 says, in effect, that any ordinance *regulating* the "use, sale * * * of real property * * * on the basis of race, color, religion, national origin or ancestry * * *" cannot be passed by the Council of the city of Akron, but must be submitted to the electorate for passage and adoption.

It does not deny the rights granted to everyone to acquire and possess property. All rights granted the citizens of Akron to acquire and possess property are retained. It denies the Council of the city of Akron the power to pass legislation regulating the "use, sale * * * of real property" when the basis of that legislation is predicated upon "race, color, religion, national origin or ancestry". It retains the power to pass such regulatory legislation in the people from whom all powers, including those of the council of the city of Akron, originate. It limits the ways in which such legislation may be passed. It does not deny the people the opportunity to pass it. Such limitation of power in the legislative branch of government is not a denial of a right. It is a procedural matter, so long as the right to legislate is not denied the people.

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We are not called upon to decide legislation denying our citizens their rights to acquire and possess property. We are required only to determine if legislative powers may be retained in the people, as opposed to a legislative body, i.e., the council of the city of Akron, insofar as Charter Amendment No. 137 is concerned.

We determine that Charter Amendment No. 137 is a valid enactment, not in conflict with constitutional authority, either State or Federal.

For the reasons stated, we find that Charter Amendment No. 137 repeals Ordinances Numbers 873-1964 and 926-1964, of the City of Akron.

We further conclude that no law now exists, nor did any law exist on February 3, 1965, upon which the petitioner may predicate an action for a writ of mandamus; that the question is moot, and the petition of the relator must be denied.

Writ denied.

DOYLE, *P.J.*, and HUNSICKER, *J.*, concur.

APPENDIX C

Ordinance No. 873-1964 of the City of Akron, Ohio

ORDINANCE No. *873-1964* declaring a public policy of equality of opportunity in housing, creating and establishing a commission in the Office of the Mayor, which commission shall be called the "Commission on Equal Opportunity In Housing"; prescribing the duties of said Commission on Equal Opportunity in Housing; prohibiting certain acts as unfair housing practices; and declaring an emergency.

WHEREAS, The population of The City of Akron consists of people of different race, color, religion, ancestry or national origin, many of who live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing; and

WHEREAS, These conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of The City of Akron and reducing its productive capacity; and

WHEREAS, The harmful effects produced by discrimination in housing also increase the cost of government and reduce the public revenues, thus imposing financial burdens upon the public for the relief and amelioration of the conditions so created; and

WHEREAS, Discrimination in housing results in other forms of discrimination and segregation which are prohibited by the Constitution of the United States of America,

and are against the laws and policy of the State of Ohio and The City of Akron; and

WHEREAS, Discrimination in housing adversely affects the continued redevelopment, renewal, growth and progress of the City of Akron;

NOW THEREFORE, BE IT ENACTED by the Council of The City of Akron:

SECTION 1. *Declaration of Policy.*

It is hereby declared to be the policy of The City of Akron, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the City's trade, commerce and manufacturers, to assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin, and to that end to prohibit discrimination in housing by any person or institution.

SECTION 2. To effectuate said policy there is hereby created in the Office of the Mayor a Commission on Equal Opportunity in Housing, which shall consist of five members who shall be appointed by the Mayor for a term of five years each; provided, however, that when the first Commission on Equal Opportunity in Housing shall be appointed under the provisions herein, the members thereof shall be appointed for one, two, three, four, and five years, respectively.

SECTION 3. *Definitions.*

As used in this ordinance, unless a different meaning clearly appears from the context, the following terms shall have the meanings ascribed in this section:

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(a) "Person" means any individual, partnership, association, organization, corporation, legal representative, trustee, receiver, any owner, lessee, proprietor, manager, agent, or employee; any real estate broker, salesman, managing agent, or other person having the right to sell, rent, lease, sub-lease, assign, transfer, or otherwise dispose of a housing accommodation, or having the right to negotiate a sale, rental, lease, sublease, assignment, transfer, or other disposition of a housing accommodation; the state, any of its political subdivisions, or any authority, agency, board, or commission thereof; lending institution regularly engaged in the business of lending money or guaranteeing loans; and other organized groups of persons.

(b) "Housing" means any buildings, structure, or part thereof which is used or occupied, or is intended, arranged, or designed to be used or occupied as the permanent or temporary home or residence of one or more human beings; or any vacant land for sale or lease for housing; provided that housing does not include rental accommodations in owner-occupied dwellings in which the owner, at the time of rental, maintains one of the accommodations as his family residence.

(c) "Unlawful housing practice" means any act prohibited by Section 4 of this Ordinance.

(d) "Discrimination" means any difference in treatment, including segregation, directly or indirectly, because of race, color, religion, national origin, or ancestry.

(e) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing because of race, color, religion, national origin, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, national origin, or ancestry as a condition of affiliation or approval.

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(f) *Commission.* The term "Commission" means the Commission on Equal Opportunity in Housing established in the Office of the Mayor pursuant to this Ordinance.

SECTION 4. *Prohibitions.*

It shall be an unlawful housing practice:

(a) For any person because of race, color, religion, or nation origin, or ancestry, to:

(1) Refuse to sell, rent, lease, sublease, assign, transfer, or otherwise deny or withhold any housing to any person; or to refuse to negotiate for any such purpose;

(2) Represent to any person that housing is not available for inspection when in fact it is so available;

(3) Discriminate against any person in the terms, conditions, or privileges of the sale, rental, sublease, assignment, or transfer of any housing or in the furnishing of facilities or services in connection therewith.

(b) For any person to whom application is made for financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of any housing to:

(1) Make written or oral inquiry as to the race, color, religion, national origin, or ancestry of the person or persons seeking such financial assistance or of prospective occupants or tenants of the affected housing;

(2) Discriminate against any person or persons because of race, color, religion, national origin, or ancestry in the terms, conditions, or privileges relating to the obtaining or use of such financial assistance.

(c) For any person to include in any transfer, rental, or lease of housing any restrictive covenants; or for any person to honor or exercise, or attempt to honor or exercise any restrictive covenant pertaining to housing;

(d) For any person to print or publish, or cause to be printed or published, any notice or advertisement relating to the transfer, rental, or lease of any housing which indicates any preference, limitation, or specification based on race, color, religion, national origin, or ancestry;

(e) For any person to aid, abet, incite, compel, or coerce the doing of any act defined in this section as an unlawful housing practice, or to obstruct or prevent any person from complying with this section or any order issued under this section or to attempt, directly or indirectly, to commit any act defined in this section to be an unfair housing practice;

(f) For any person to induce or solicit a housing listing or transaction by misrepresentations regarding the present or prospective composition of a neighborhood, or the effect of such composition of the neighborhood, where such misrepresentations include a reference to the race, color, religion, national origin, or ancestry of any other person.

SECTION 5. *Duties of the Commission on Equal Oppority in Housing.*

It shall be the duty of the Commission to:

(a) Initiate or receive and investigate complaints charging unlawful housing practices;

(b) Seek conciliation of such complaints, hold hearings, make findings of fact, issue orders and publish its findings of fact and orders in accordance with the provisions of this ordinance and with the ordinance establishing the Commission;

(c) Render from time to time, but not less than once a year, a written report of its activities and recommendations

with respect to fair housing practices to the Mayor and to the City Council; and

(d) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance.

SECTION 6. *Enforcement Procedure.*

(a) A complaint charging a violation of this ordinance may be made by the Commission itself or by an aggrieved individual.

(b) The Commission shall make a prompt and full investigation of such complaint of an unlawful housing practice.

(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

(d) In any case of failure to eliminate the alleged unlawful housing practice charged in the complaint by means of conciliation or persuasion and upon making a determination of probable cause for crediting the allegations of a complaint filed hereunder, the Commission may direct the Law Director of the City of Akron to commence an action in the Court of Common Pleas within the county in which the alleged violation, which is the subject of the complaint, occurs, or in which any defendant resides, or transacts business, seeking appropriate injunctive relief against such defendant or defendants, in order to prevent any conduct tending to render ineffectual any steps that the Commission or the courts may take in order to eliminate or remedy such

violation, and in such action to seek orders restraining and enjoining such defendant or defendants from selling, renting, or otherwise making unavailable to the person or persons discriminated against the housing accommodations with respect to which the complaint is made, and the court shall grant such temporary relief or restraining orders, upon such terms and conditions, as it deems just and proper, pending the final determination of the proceedings under this title. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful housing practice, hereinafter referred to as respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the complaint. The respondent shall have the right to file an answer to the complaint, to appear at the hearing in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses. At such hearing the Commission shall have the power to issue subpoenas to compel the attendance of the witnesses and the production of books and papers and other evidence necessary for a determination of the complaint.

(e) If upon all the evidence presented, the Commission finds that the respondent has not engaged in any unlawful housing practice, it shall state its findings of fact, dismiss the complaint, and instruct the Director of Law of the City of Akron to dismiss any legal proceedings which may have been instituted in the Court of Common Pleas. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant. If the Commission further finds that relief of a final and permanent nature is warranted to eliminate or remedy any unlawful housing practice and to enforce the provisions of this title, it shall

direct the Law Director of the City of Akron to prosecute any action or proceedings in the appropriate Court of Common Pleas as may be necessary to obtain such relief and enforcement.

SECTION 7. *Exceptions.*

Nothing in this ordinance shall prohibit the sale, lease, rental or transfer of real property or any interest therein as between private parties, provided, however, that such transaction or transactions shall not have the effect of placing the property upon the public or open market, or invite the public to bid upon, offer, or accept an offer for the sale, lease, rental or transfer of such property.

SECTION 8. *Severability.*

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons or circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

SECTION 9. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, for the reason that it is desirable to eliminate discrimination in housing

at the earliest possible moment, and provided this ordinance receives the affirmative vote of two-thirds of the members elected or appointed to Council it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

Passed: July 14, 1964

JOSEPH A. DENHOLM
Clerk of Council

LARRY Z. KISH
Acting President of the Council

Approved: July 18, 1964

EDWARD ERICKSON
Mayor

APPENDIX D

Ordinance No. 926-1964 of the City Ordinance

ORDINANCE No. 926-1964 amending Section 6 of Ordinance No. 873-1964, passed July 14, 1964, relating to equal opportunity in housing, for clarification and to provide a penalty for violation of said ordinance, and declaring an emergency.

BE IT ENACTED by the Council of the City of Akron:

"SECTION 1. That Section 6 of Ordinance No. 873-1964, passed July 14, 1964, be and the same is hereby amended to provide as follows:

"SECTION 6. *Enforcement Procedure.*

"(a) A complaint charging a violation of this ordinance may be made by the Commission itself or by an aggrieved individual.

"(b) The Commission shall make a prompt and full investigation of each complaint of an unlawful housing practice.

"(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the alleged unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

"(d) In any case of failure to eliminate the alleged unlawful housing practice charged in the complaint by means of conciliation or persuasion,

the Commission shall hold a public hearing to determine whether or not an unlawful housing practice has been committed. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful housing practice, hereinafter referred to as respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the complaint. The respondent shall have the right to file an answer to the complaint, to appear at the hearing in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses. At such hearing the Commission shall have the power to issue subpoenas to compel the attendance of the witnesses and the production of books and papers and other evidence necessary for a determination of the complaint.

"(e) If upon all the evidence presented, the Commission finds that the respondent has not engaged in any unlawful housing practice, it shall state its findings of fact, dismiss the complaint. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant.

"(f) In the event the respondent fails to comply with any order issued by the Commission, it shall certify the case and the entire record of its proceedings to the City Director of Law for appropriate action to secure enforcement of the Commission's order.

"(g) Any person who violates any of the provisions of this ordinance or any rule or regulation

adopted by the Commission or who fails to comply with any order of the Commission, shall be subject to a fine not exceeding Fifty and 00/100 Dollars and costs."

SECTION 2. That existing Section 6 of Ordinance No. 873-1964, passed July 14, 1964, be and the same is hereby repealed.

SECTION 3. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, for the reason that it is desirable to clarify a portion of said ordinance and it is to the best interest of the public that a penalty for violation of said ordinance be enacted; and provided the ordinance receives the affirmative vote of two-third of the members elected or appointed to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

Passed: July 21, 1964

JOSEPH A. DENHOLM
Clerk of Council

ROSE RAIES
Deputy Clerk of Council

RALPH E. TURNER
President of the Council

Approved: July 22, 1964

EDWARD ERICKSON
Mayor

APPENDIX E

Section 137 of the Charter of the City of Akron, Ohio

"Section 137. (Regulation of Real Property Rights)

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein."

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 63

THE STATE OF OHIO, *ex rel.*, NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON,

Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS
and
STATEMENT OPPOSING JURISDICTION.

WILLIAM R. BAIRD,
Director of Law,
ALVIN C. VINOPAL,
Assistant Director of Law,
Municipal Building,
Akron, Ohio,
Attorneys for Appellees.

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OCTOBER TERM, 1967.

No. 1359.

THE STATE OF OHIO, *ex rel.*, NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON,

Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS and STATEMENT OPPOSING JURISDICTION.

MOTION TO DISMISS.

Appellees in the above styled cause, pursuant to Rule 16 (1) (d) and (1) (b) of the rules of the Supreme Court of the United States, move that the appeal be dismissed and the judgment of the Supreme Court of Ohio be affirmed on the grounds that, by virtue of the Civil Rights Act of April 11, 1968, the Fourteenth Amendment issue raised herein is now moot; that the decision of the Supreme Court of Ohio does not deny appellant equal protection of the laws contrary to Section One of the Fourteenth Amendment of the Constitution of The United States; that the decision of the Supreme Court of Ohio does not

present a substantial federal question; that the decision of the Supreme Court of Ohio rests on an adequate non-federal basis.

STATEMENT OPPOSING JURISDICTION.

The Appellees in the above entitled cause for their statement in opposition to Appellant's statement as to jurisdiction and in support of their motion to dismiss or affirm, respectfully state the following:

STATEMENT OF THE CASE.

The Akron Fair Housing legislation became effective on July 18, 1964, but on August 25, 1964, initiative petitions for Charter Amendment Section 137, which would invalidate such legislation until approved by the electors, were filed with the Clerk of Council. The complaint of appellant was filed approximately 150 days after the initiative petitions had been filed and about 80 days after the Charter Amendment was approved by the electors.

ARGUMENT.

(A) Claim of denial of equal protection of the laws in violation of the Fourteenth Amendment, is now moot.

The 90th Congress of the United States passed a new act known as Public Law 90-284; H. R. 2516 which was approved on April 11, 1968. Title Eight (8) thereof provides for fair housing throughout the United States. The complaint asserted by the appellant is now prohibited by Section (804) of Title (8) of the act and, therefore, the Constitutional issue raised by the appellant is now moot. (See Appendix A, *infra*, pp. 7-8)

This Court has followed the practice of not passing upon moot questions. The Federal question raised herein

is now important only to the parties and does not require the resolution of principles, the settlement of which are important to the public. See:

Rice v. Sioux City Cemetery, 349 U. S. 70;
N. L. Liner v. Jafco Inc., 375 U. S. 301;
United States of America v. Alaska Steamship Co., 253 U. S. 111.

(B) Decision of the Supreme Court of Ohio does not deny appellant equal protection of the laws contrary to Section (1) of the Fourteenth Amendment of the Constitution of the United States.

Section Two (2) of Article One, (I) of the Constitution of the State of Ohio provides:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

The Akron Charter Amendment was a lawful alteration by the people of Akron in the legislative procedural form of their local government. Neither the Federal nor the State Constitutions required Akron to have a fair housing law.

The City Council, if it had been so disposed, may well have refused to enact fair housing legislation. This would have left the proponents to pursue the matter by initiative petition upon the signatures of 7% of the electorate. In that event appellant would be more amenable to the will of the people than she is now with the Charter provision and there could be no equal protection issue.

Under the charter in its present posture we find that the City Council may pass fair housing legislation and appellant is not required to obtain one single signature in order to get the measure before the electorate. Charter Amendment 137 is no block—no advance repealer. It is but an extension of one of the highest democratic processes constitutionally provided under our republican form of government.

If fair housing legislation should become a one-way street, the whole structure of constitutional guarantees to the people may well collapse. The Supreme Court of Ohio has reconciled freedom with equality and thus preserved the orderly processes of government.

We are unable to find where this Court in *Reitman v. Mulkey* held that California could not now repeal its restored fair housing legislation. This Court has traditionally avoided imposing federal constitutional limits on the allocation of lawmaking process within the state government. See

Highland Farm Dairy Inc. v. J. D. Agnew, 300 U. S. 608;

Pacific States Tel & Tel v. State of Oregon, 223 U. S. 118.

(C) The decision of the Supreme Court of Ohio does not present a substantial federal question.

The Supreme Court of Ohio made absolutely no finding of state involvement. There was no fact finding which established the existence of an environment of private discrimination encouraged by the state. On the other hand, the Court found that the inclination to proceed solely in Fair Housing was the immediate object of the amendment and that as such was a reasonable and permis-

sible objective under Articles I and XVIII of the Ohio Constitution.

There was no finding that the ultimate impact of the amendment would result in state encouragement of private discrimination. In the absence of facts to the contrary, it would seem that this Court would be without precedent to overrule the Ohio court.

When the purpose, scope, and operative effect of charter Amendment 137 is examined by reasonable minds, the conclusion is inescapable that the state by and through the City of Akron had not been involved in encouraging private racial discrimination in housing. The Supreme Court of Ohio rendered a unanimous decision written by its Chief Justice.

It cannot be fairly said that the right to discriminate in Akron is immune from legislative, executive, or judicial regulation at any level of the state government. The State of Ohio now has a fair housing law. Chapter 4112 of Title 41, Ohio Revised Code, has been amended to make unlawful certain discriminatory practices relating to commercial housing and private residences. These amendments became effective October 30, 1965. (See Appendix B, *infra*, pp. 8-12.)

(D) A determination of the federal question raised by appellant was not necessary in the decision rendered by the Ohio Supreme Court and the decision as rendered was based upon adequate non-federal grounds and should not be reviewed by this Court.

The proceedings before the state court, for the most part, concerned the determination of whether the fair housing legislation came under the definition of a regulatory measure. Appellant contended that it was prohibitory and thus should not be governed by Amendment 137

because that amendment made no reference to prohibited acts.

The Supreme Court of Ohio held that the housing ordinances were regulatory measures permissible by Ohio Home Rule. The federal question was in no way necessary to this determination because the essential issue was one governed by Ohio law.

Although the decision of the Ohio Supreme Court may well rest upon the federal ground as well as a non-federal one, since the non-federal ground is independent of the federal ground and is adequate to support the judgment, the decision should not be disturbed. See:

Nick Jankovich v. Indiana Toll Rd. Com., 379 U. S. 487;

John G. Fischer v. City of St. Louis, 194 U. S. 362.

CONCLUSION.

It is respectfully submitted therefore that the decision of the Supreme Court of Ohio does not deny appellant equal protection of the laws; that the decision is based upon adequate and independent non-federal grounds; that no substantial federal question is presented; that the federal question, if any, is now moot and that this appeal should be dismissed.

Respectfully submitted,

WILLIAM R. BAIRD,
Director of Law,
ALVIN C. VINOPAL,
Assistant Director of Law,
Attorneys for Appellees.

APPENDIX A.

Federal Civil Rights Act, Title VIII—Fair Housing.

POLICY.

Sec. 801. It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

* * * * * *

DISCRIMINATION IN THE SALE OR RENTAL OF HOUSING.

Sec. 804. As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

APPENDIX B.

Ohio Revised Code, Title 41.

§ 4112.01 Definitions.

As used in sections 4112.01 to 4112.08, inclusive, of the Revised Code:

(A) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. It also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesman, agent, employee, lending institution, and the state, and all political sub-divisions, authorities, agencies, boards, and commissions thereof.

* * * * * *

(J) "Housing accommodations" includes any building or structure or portion thereof which is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or leased for commercial housing.

(K) "Commercial housing" means housing accommodations held or offered for sale or rent by a real estate broker, salesman, or agent, or by any other person pursuant to authorization of the owner, by the owner

himself, or by legal representatives, but does not include any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employee.

(L) "Personal residence" means a building or structure containing living quarters occupied or intended to be occupied by no more than two individuals, two groups, or two families living independently of each other and occupied by the owner thereof as a bona fide residence for himself and any members of his family forming his household. If a personal residence is vacated by the owner it shall continue to be considered owner-occupied until occupied by someone other than the owner or until sold by the owner, whichever occurs first.

(M) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing because of race, color, religion, national origin, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, national origin, or ancestry as a condition of affiliation or approval.

§ 4112.02 Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

* * * * *

(H) For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold commercial housing from any person because of the race, color, religion, ancestry, or national origin of any prospective owner, occupant, or user of such commercial housing;

(2) Represent to any person that commercial housing is not available for inspection when in fact it is so available;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a *personal residence** from any person because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such commercial housing, provided such person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects of his business or incidental to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or sub-leasing any commercial housing or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any commercial housing because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such commercial housing;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a *personal residence* because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such commercial housing or personal residence;

(6) Print, publish, or circulate any statement or advertisement relating to the sale, transfer, assignment,

* Italics added.

rental, lease, sub-lease, or acquisition of any commercial housing or *personal residence* or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a personal residence which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, ancestry, or national origin;

(7) Make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, ancestry, or national origin in connection with the sale or lease of any commercial housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing or a *personal residence;*

(8) Include in any transfer, rental, or lease of commercial housing or a *personal residence* any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any such restrictive covenant, provided that the prior inclusion of a restrictive covenant in the chain of title shall not be deemed a violation of this provision;

(9) Induce or solicit or attempt to induce or solicit a commercial housing or *personal residence* listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, ancestry, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, or ethnic composition of the block, neighborhood or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

No person shall discourage or attempt to discourage the purchase by a prospective purchaser of a commercial housing or a personal residence by representing that any block, neighborhood, or area has or might undergo a change with respect to the religious, racial, or nationality composition of the block, neighborhood, or area.

* * * * *

IN THE

Supreme Court of the United States

October Term, 1968

No. 63

THE STATE OF OHIO, EX REL. NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON
Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLANT

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of Ohio (App. 47) is reported at 12 Ohio St. 2d 116, 233 N.E. 2d 129.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on December 27, 1967 (App. 47). Notice of appeal to this Court was filed on March 16, 1968 (App. 53), and appellant was granted an extension until April 25, 1968, to perfect this appeal (App. 56). The appeal was docketed on April 24, 1968, and probable jurisdiction was noted on June 3, 1968. Jurisdiction of this Court rests on Title 28, United States Code, Section 1257(2).

Statutes Involved

Ordinance No. 873–1964 provides as follows:

WHEREAS, The population of The City of Akron consists of people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing; and

WHEREAS, These conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of The City of Akron and reducing its productive capacity; and

WHEREAS, The harmful effects produced by discrimination in housing also increase the cost of government and reduce the public revenues, thus imposing financial burdens upon the public for the relief and amelioration of the conditions so created; and

WHEREAS, Discrimination in housing results in other forms of discrimination and segregation which are prohibited by the Constitution of the United States of America, and are against the laws and policy of the State of Ohio and The City of Akron; and

WHEREAS, Discrimination in housing adversely affects the continued redevelopment, renewal, growth and progress of The City of Akron;

NOW THEREFORE, BE IT ENACTED by the Council of The City of Akron:

SECTION 1. DECLARATION OF POLICY.

It is hereby declared to be the policy of The City of Akron, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the City's trade, commerce and manufacturers, to assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin, and to that end to prohibit discrimination in housing by any person or institution.

SECTION 2. To effectuate said policy there is hereby created in the Office of the Mayor a Commission on Equal Opportunity in Housing, which shall consist of five members who shall be appointed by the Mayor for a term of five years each; provided, however, that when the first Commission on Equal Opportunity in Housing shall be appointed under the provisions herein, the members thereof shall be appointed for one, two, three, four, and five years, respectively.

SECTION 3. DEFINITIONS.

As used in this ordinance, unless a different meaning clearly appears from the context, the following term shall have the meanings ascribed in this section:

(a) "Person" means any individual, partnership, association, organization, corporation, legal representative, trustee, receiver, any owner, lessee, proprietor, manager, agent, or employee; any real estate broker, salesman, managing agent, or other person having the right to sell, rent, lease, sub-lease, assign, transfer, or otherwise dispose of a housing accommodation, or having the right to negotiate a sale, rental, lease, sublease, assignment, transfer, or other disposition of a housing accommodation; the state, any of its political subdivisions, or any authority, agency, board, or commission thereof; lending institution regularly en-

gaged in the business of lending money or guaranteeing loans; and other organized groups of persons;

(b) "Housing" means any buildings, structure, or part thereof which is used or occupied, or is intended, arranged, or designed to be used or occupied as the permanent or temporary home or residence of one or more human beings; or any vacant land for sale or lease for housing; provided that housing does not include rental accommodations in owner-occupied dwellings in which the owner, at the time of rental, maintains one of the accommodations as his family residence.

(c) "Unlawful housing practice" means any act prohibited by Section 4 of this Ordinance.

(d) "Discrimination" means any difference in treatment, including segregation, directly or indirectly, because of race, color, religion, national origin, or ancestry.

(e) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing because of race, color, religion, national origin, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, national origin, or ancestry as a condition of affiliation or approval.

(f) *Commission.* The term "Commission" means the Commission on Equal Opportunity in Housing established in the Office of the Mayor pursuant to this Ordinance.

SECTION 4. PROHIBITIONS.

It shall be an unlawful housing practice:

(a) For any person because of race, color, religion, or national origin, or ancestry to:

(1) Refuse to sell, rent, lease, sublease, assign, transfer, or otherwise deny or withhold any housing

to any person, or to refuse to negotiate for any such purpose;

(2) Represent to any person that housing is not available for inspection when in fact it is so available;

(3) Discriminate against any person in the terms, conditions, or privileges of the sale, rental, sublease, assignment, or transfer of any housing or in the furnishing of facilities or services in connection therewith.

(b) For any person to whom application is made for financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of any housing to:

(1) Make written or oral inquiry as to the race, color, religion, national origin, or ancestry of the person or persons seeking such financial assistance or of prospective occupants or tenants of the affected housing;

(2) Discriminate against any person or persons because of race, color, religion, national origin, or ancestry in the terms, conditions, or privileges relating to the obtaining or use of such financial assistance.

(c) For any person to include in any transfer, rental, or lease of housing any restrictive covenants; or for any person to honor or exercise, or attempt to honor or exercise any restrictive covenant pertaining to housing;

(d) For any person to print or publish, or cause to be printed or published, any notice or advertisement relating to the transfer, rental, or lease of any housing which indicates any preference, limitation, or specification based on race, color, religion, national origin, or ancestry;

(e) For any person to aid, abet, incite, compel, or coerce the doing of any act defined in this section as an unlawful housing practice, or to obstruct or prevent any person from complying with this section or any order issued under this section or to attempt, directly or indirectly, to commit any act defined in this section to be an unfair housing practice;

(f) For any person to induce or solicit a housing listing or transaction by misrepresentations regarding the present or prospective composition of a neighborhood, or the effect of such composition of the neighborhood, where such misrepresentations include a reference to the race, color, religion, national origin, or ancestry of any other person.

SECTION 5. DUTIES OF THE COMMISSION ON EQUAL OPPORTUNITY IN HOUSING.

It shall be the duty of the Commission to:

(a) Initiate or receive and investigate complaints charging unlawful housing practices;

(b) Seek conciliation of such complaints, hold hearings, make findings of fact, issue orders and publish its findings of fact and orders in accordance with the provisions of this ordinance and with the ordinance establishing the Commission;

(c) Render from time to time, but not less than once a year, a written report of its activities and recommendations with respect to fair housing practices to the Mayor and to the City Council; and

(d) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance.

SECTION 6. ENFORCEMENT PROCEDURE.

(a) A complaint charging a violation of this ordinance may be made by the Commission itself or by an aggrieved individual.

(b) The Commission shall make a prompt and full investigation of such complaint of an unlawful housing practice.

(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

(d) In any case of failure to eliminate the alleged unlawful housing practice charged in the complaint by means of conciliation or persuasion and upon making a determination of probable cause for crediting the allegations of a complaint filed hereunder, the Commission may direct the Law Director of the City of Akron to commence an action in the Court of Common Pleas within been instituted in the Court of Common Pleas. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant. If the Commission further finds that relief of a final and permanent nature is warranted to eliminate or remedy any unlawful housing practice and to enforce the provisions of this title, it shall direct the Law Director of the City of Akron to prosecute any action or proceedings in the appropriate Court of Common Pleas as may be necessary to obtain such relief and enforcement.

SECTION 7. EXCEPTIONS.

Nothing in this ordinance shall prohibit the sale, lease, rental or transfer of real property or any interest therein as between private parties, provided, however, that such transaction or transactions shall not have the effect of placing the property upon the public or open market, or invite the public to bid upon, offer, or accept an offer for the sale, lease, rental or transfer of such property.

SECTION 8. SEVERABILITY.

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons or circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

SECTION 9. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, for the reason that it is desirable to eliminate discrimination in housing at the earliest possible moment, and provided this ordinance receives the affirmative vote of two-thirds of the members elected or appointed to Council it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

ORDINANCE No. 926–1964 provides:

SECTION 1. That Section 6 of Ordinance No. 873-1964, passed July 14, 1964, be and the same is hereby amended to provide as follows:

"SECTION 6. ENFORCEMENT PROCEDURE

"(a) A complaint charging a violation of this ordinance may be made by the Commission itself or by an aggrieved individual.

"(b) The Commission shall make a prompt and full investigation of each complaint of an unlawful housing practice.

"(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the alleged unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

"(d) In any case of failure to eliminate the alleged unlawful housing practice charged in the complaint by means of conciliation or persuasion, the Commission shall hold a public hearing to determine whether or not an unlawful housing practice has been committed. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful housing practice, hereinafter referred to as respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the complaint. The respondent shall have the right

to file an answer to the complaint, to appear at the hearing in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses. At such hearing the Commission shall have the power to issue subpoenas to compel the attendance of the witnesses and the production of books and papers and other evidence necessary for a determination of the complaint.

"(e) If upon all the evidence presented, the Commission finds that the respondent has not engaged in any unlawful housing practice, it shall state its findings of fact, dismiss the complaint. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant.

"(f) In the event the respondent fails to comply with any order issued by the Commission, it shall certify the case and the entire record of its proceedings to the City Director of Law for appropriate action to secure enforcement of the Commission's order.

"(g) Any person who violates any of the provisions of this ordinance or any rule or regulation adopted by the Commission or who fails to comply with any order of the Commission, shall be subject to a fine not exceeding Fifty and 00/100 Dollars and costs."

SECTION 2. That existing Section 6 of Ordinance No. 873-1964, passed July 14, 1964, be and the same is hereby repealed.

SECTION 3. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, for the reason

that it is desirable to clarify a portion of said ordinance and it is to the best interest of the public that a penalty for violation of said ordinance be enacted; and provided this ordinance receives the affirmative vote of two-thirds of the members elected or appointed to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

Section 137, Amendment to the Charter of the City of Akron provides:

> Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisements, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Questions Presented

1. Does the action of the City of Akron, taken by a majority of the electorate through referendum barring the enactment of legislation regulating real property on racial, religious or ethnic grounds, unless and until approved by a majority vote of the city electorate, constitute a forbidden racial classification within the meaning of the Fourteenth Amendment to the Constitution of the United States?

2. Does Section 137 of the Charter of the City of Akron deny to appellant her constitutionally secured right to equal protection and freedom from racial discrimination in her effort to secure adequate shelter within the City of Akron?

3. Does Section 137 of the Charter of the City of Akron restrict the power of the government to protect its citizenry against racial discrimination to such a degree as to involve the state in a substantial way in maintaining and perpetrating racial discrimination in violation of the Fourteenth Amendment?

Statement

This appeal calls into question the constitutional validity of an amendment to the City Charter of Akron, Ohio, which withdraws from the city council power to legislate against racial discrimination in housing and nullifies enforcement of all previously passed fair housing ordinances.

The facts are not in dispute. The City of Akron is an incorporated municipality (App. 2). It is governed by a council having full power and authority to exercise all powers given it by the Constitution of Ohio, the Akron Charter and the General Assembly (Section 27, Charter of the City of Akron, App. 35). These powers, the Ohio Supreme Court has ruled, include the right to pass fair housing legislation designed to protect Negroes and other racial or religious groups from discrimination in obtaining housing. *State, ex rel. Hunter* v. *Erickson,* 6 Ohio St. 2d 130, 216 N.E. 2d 371 (1966).

On July 14, 1964, the Council of the City of Akron, Ohio, enacted fair housing legislation in the form of Ordinance No. 873–1964 (App. 5-13). Pursuant thereto equality of opportunity in housing was promulgated as local public policy. The law declared that many of Akron's multi-racial population "live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing" (App. 5). Such discrimination was found to be injurious to "public safety, public health and general welfare" (*Id.*), was said to compel increased governmental costs, and to cause other forms

of segregation and discrimination prohibited by the Constitution of the United States and by the laws and the policy of the State of Ohio and the City of Akron. The ordinance approved on July 18, 1964, prohibited various forms of racial discrimination in the sale, rental and leasing of housing and established in the Mayor's office a Commission on Equal Opportunity in Housing to administer and enforce its provisions. Thereafter, on July 21, 1964, Section 6 was amended in the form of Ordinance No. 926–1964 (App. 14-16) and approved on July 22, 1964.

On August 25, petitions were filed with the city clerk which resulted in Section 137, proposed as an amendment to the city charter, being placed on the ballots at the general election on November 3, 1964. This provision was passed by the majority of the voters (App. 18).

On January 26 and 27, 1965, appellant, a Negro woman, and for whose benefit it was conceded and stipulated (App. 24) that Ordinances Nos. 873–1964 and 926–1964 were enacted, by affidavit, filed a complaint with the Mayor and the members of the Commission on Equal Opportunity in Housing, alleging that in her effort to secure adequate housing she had been subjected to discrimination, in violation of aforesaid local laws (App. 2-3). The commission, on January 30, refused and declined to process or handle appellant's complaint. Thereafter, on February 1, 1965, a demand was made upon the city director of law to institute mandamus proceedings seeking to compel the commission and the Mayor to enforce the ordinances (App. 3). The city director refused to bring the requested action (App. 3). On February 3, 1965, appellant instituted the present proceedings by filing an original petition for writ of mandamus in the Court of Appeals for the 9th Judicial District, pursuant to Chapter 733.56-733.59 and Chapter 2731 to 2731.02, Ohio Revised Code, seeking to compel performance by respondents, the Mayor and the Commission on Equal Opportunity in Housing, of their official duties as mandated by the two afore-

said ordinances. A demurer to the petition was sustained by the court of appeals (App. 38). On appeal to the Supreme Court of Ohio, that decision was reversed. In effect, the Supreme Court of Ohio held that the fair housing ordinances in question were valid enactments and met state law requirements. See *State ex rel. Hunter* v. *Erickson*, 6 Ohio 58, 2d 130, 216 NE 2d 371 (1966).

On remand to the court of appeals, respondents filed an answer (App. 17-18) admitting the allegations of fact set out herein, but alleging that the adoption of Section 137 as an amendment to the city charter by the majority of the Akron electorate at the November 3, 1964, general election had rendered the ordinances in question inoperative and ineffective. Appellant, in reply (App. 19-23), challenged the validity of Section 137 on state procedural grounds and on the grounds that it constituted a violation of both the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and conflicted with the rights granted all citizens under Title 42 U.S.C., Section 1982. The cause was thereupon submitted to the court of appeals on the pleadings and stipulations.

On February 8, 1967, that court held Section 137 had been properly placed on the ballot on November 3, 1964; that its terms and enactment by the majority of the electorate were not at variance with either state or federal law; and that by its adoption the fair housing ordinances relied upon by appellant were no longer operative (App. 38-44).

The cause was appealed to the Supreme Court of Ohio, and the lower court judgment was affirmed in a decision entered on December 27, 1967 (App. 47-52). The court distinguished this Court's decision in *Reitman* v. *Mulkey*, 378 U.S. 369. It said that in *Reitman* a state constitutional provision forbade any regulation of individual freedom to sell, lease or rent real property, while here Section 137

placed no such absolute limitation on governmental authority. Further, the court stated that, while voter approval was necessary only in respect to legislation adopted by the city council which seeks to regulate the use, sale, rental or lease of real property on racial and religious grounds, and that Section 137 was, therefore, class legislation, it constituted a reasonable classification under Ohio law and within the meaning of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Thereupon, appellant brought the cause here for review on appeal.

Summary of Argument

By enactment of Section 137, an amendment to the Charter of the City of Akron, the Akron electorate has acted contrary to the restraints of the Constitution of the United States. Not merely has a fair housing measure been repealed, but no future city ordinance "which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry" could be enacted into law without being first approved by a majority of the electors at a regular or general election. No such requirement applies to any other kind of law the council of the city is empowered to promulgate.

Section 137 is constitutionally impermissible because it constitutes an invalid racial classification within the meaning of the Fourteenth Amendment. Such legislation cannot be justified as furthering any legitimate state function. On the contrary, the law in purpose and effect maintains, supports and perpetuates the private anti-Negro prejudices of Akron's dominant white majority in maintaining a ra-

cially restricted housing market, thereby limiting, restricting and denying to black residents of the city access to housing on equal terms with white residents. As such, it cannot stand. *McLaughlin* v. *Florida*, 379 U.S. 184; *Loving* v. *Virginia*, 388 U.S. 1.

What Section 137 does is to freeze the democratic process in favor of the status quo in which non-whites are unable to buy, rent or lease housing outside those areas reserved for blacks. In addition, it is exceedingly difficult, if not impossible, for the Negro citizens of Akron and their allies to ever again succeed in obtaining the enactment of open housing legislation. This was the vice of California's Proposition 14, which the Court struck down in *Reitman* v. *Mulkey*, 387 U.S. 369, and under the rationale of that case Section 137 too must be struck down.

Finally, Section 137 must fall because it conflicts with Title 42, U.S.C. Section 1982 which this Court construed in *Jones* v. *Mayer*, — U.S. —, 36 LW 4661 (decided June 17, 1968), as barring discrimination in the sale and rental of all housing in this country, both public and private. The inability of black Americans to buy housing that white Americans are free to purchase is an incident and relic of the slave status which Congress meant to eliminate by adoption of Section 1982.

ARGUMENT

I

Section 137 Constitutes an Invalid Racial Classification Under Fourteenth Amendment Yardsticks

The paramount issue presented herein is whether the City of Akron has an interest in insulating white home owners from the vicissitudes resulting from the free movement of black Americans in the housing market sufficient to

justify a statutory racial classification. The court below found the requisite justification. It ruled that the Akron city charter could reasonably contain a provision which on its face amounted to a racial classification and in operation served to limit the city council's police powers only in the field of legislation designed to insure Negroes equal housing opportunities (App. 48-49).

Finding that it was reasonable for a municipal corporation to proceed slowly in providing for equal protection for its black citizens because race relations is "an emotionally involved field," the court upheld Section 137, the newly enacted amendment to the city charter from constitutional attack.

While appellant asserts that a charter amendment designed to nullify, delay or insure the defeat of legislation bringing the police power of a municipality to bear on problems of race discrimination cannot conceivably be justified as a reasonable classification,[1] the court below erred first and foremost on the standard applied to judge the constitutional validity of the amendment.

While legislative classifications affecting all members of a class equally can normally be sustained upon a finding of reasonableness, racial classifications may only be upheld where "some overriding statutory purpose" justifies their

---

[1] Appellant notes that the court below relied on its earlier decision in Porter v. Oberlin, 1 Ohio St. 2d 143, 152, 205 N.E. 2d 363 (1965), in order to justify its finding of reasonableness. That case, however, merely determined that a fair housing ordinance did not have to address itself to all forms of housing discrimination in order to be sustained. Appellant agrees. But the passage of limited favorable legislation may not be considered on the same footing with the passage of openly hostile legislation or legislation that constitutes a racial classification which does not meet requisite constitutional standards of necessity.

passage. *McLaughlin* v. *Florida*, 379 U.S. 184, 192. See also *Loving* v. *Virginia*, 388 U.S. 1, 11.

Since *Brown* v. *Board of Education*, 347 U.S. 483, signalled the demise of discriminatory racial classifications which legislated differences between the civil rights of black and whites, this Court has universally condemned public laws creating oppressive racial distinctions. See *e.g.*, *Anderson* v. *Martin*, 375 U.S. 399; *Watson* v. *Memphis*, 373 U.S. 526; *McLaughlin* v. *Florida*, *supra*; *Loving* v. *Virginia*, *supra*. Only after a positive showing that a statutory racial requirement serves a legitimate nondiscriminatory purpose, as in the compilation of statistical data for example, has the Court upheld their use. *Tancil* v. *Woolls*, 379 U.S. 19.

Nor has the Court hesitated in setting aside subtlely discriminatory racial classifications. *Anderson* v. *Martin*, *supra*. The defect found in *Anderson*, which involved a challenge to a Louisiana statute requiring the printing of racial designations next to the names of the candidates on election ballots illustrates the inherent constitutional weakness in Akron's charter amendment No. 137. After noting that in the abstract the Louisiana law placed no restrictions upon anyone's candidacy, the Court found that the state nonetheless had furnished a vehicle for racial discrimination, concluding at page 402:

> The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.

Charter amendment No. 137 serves precisely the same purpose in that it operates as a mechanism by which white voters hold a veto over legislation favorable to Negroes. Moreover, Akron's charter amendment is more invidious than the Louisiana requirement condemned in *Anderson*.

Above and beyond inducing racial prejudice at the polls, Section 137's discriminatory effect operates instantaneously upon passage; it negates a fair housing law already on the books, requiring its proponents to wage a political campaign among the general electorate in order to have any possibility of restoring the law. As the Supreme Court of Ohio noted, this liability has been placed upon no other class of persons seeking protective legislation (App. 51).

Not only does the charter amendment fail to accomplish "some permissible State objective, independent of the racial discrimination, which it was the object of the Fourteenth Amendment to eliminate," *Loving* v. *Virginia, supra,* at 11, it serves to deprive Negroes of the opportunity to obtain housing, "a necessary of life." *Block* v. *Hirsh,* 256 U.S. 135, 156. The right of Negroes to obtain housing free from discrimination is a "fundamental right" of such importance that this Court has dispensed with well established rules of standing in order to assure protection. *Barrows* v. *Jackson,* 346 U.S. 249. Last term, violation of this fundamental right was held to be "a relic of slavery" impermissible even in the absence of state action. *Jones* v. *Mayer,* — U.S. —, 36 LW 4661 (decided June 17, 1968).

Despite the decisions of this Court and the passage of additional civil rights legislation in recent years, "some badges of slavery remain today." *Jones* v. *Mayer, supra,* 36 LW at 4671 (Douglas concurring). The existence of Section 137 as an integral component of Akron's city charter is such a remnant of the slave status. Openly and notoriously, it advertises the fact that in the sphere of housing, a basic and indispensable necessity, the rights of blacks depend upon the whims of whites.

No such provision should be allowed to exist in a country that labels itself "open" and "democratic." It should be struck down.

II

Reitman v. *Mulkey* Controls Disposition of This Appeal

Passage of charter amendment 137 and its retention as part of the basic law of Akron, significantly involves that municipality in forbidden state action within the meaning of the Fourteenth Amendment to the United States Constitution. *Reitman* v. *Mulkey*, 387 U.S. 369.

Akron's fair housing ordinances, vitiated by Section 137, were passed only after the city council made a legislative determination that racial discrimination so permeated the municipality's housing market that relief was required on an emergency basis. Both the original legislation and its amendment ordered that the ordinances "shall take effect and be in force at the earliest time allowed by law" because they were passed as "emergency measure[s] necessary for the immediate preservation of the public peace, health and safety." (App. 13, 16). The whereas clauses preceding the initial fair ordinance graphically explain its emergency nature:

> WHEREAS, The population of The City of Akron consists of people of different race, color, religion, ancestry or national origin, many of who live in circumscribed and segregated areas, under substandard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing; and
>
> WHEREAS, These conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of The City of Akron and reducing its productive capacity; and

> WHEREAS, The harmful effects produced by discrimination in housing also increase the cost of government and reduce the public revenues, thus imposing financial burdens upon the public for the relief and amelioration of the conditions so created; and
>
> WHEREAS, Discrimination in housing results in other forms of discrimination and segregation which are prohibited by the Constitution of the United States of America, and are against the laws and policy of the State of Ohio and The City of Akron; and
>
> WHEREAS, Discrimination in housing adversely affects the continued redevelopment, renewal, growth and progress of The City of Akron . . .

More than four years after the city council made a finding that racial discrimination in housing existed within the municipality and declared an emergency to achieve its elimination, Akron not only does not have a fair housing ordinance, but does not even possess the legislative authority to pass one.

The vice of Section 137, as in *Anderson* v. *Martin, supra,* is that it operates to foster the expression of racial prejudice and bias at the ballot box. The electorate of Akron tied the government's hand so that the council could not again successfully enact any fair housing legislation free from veto by the populace. It is true that Section 137 expresses the views of the majority of Akron's electorate, but it is a view that contravenes the guarantees of the due process and equal protection clauses of the 14th Amendment, and, therefore, must fall. *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410; *Brown* v. *Board of Education*, 347 U.S. 483; *Yick Wo* v. *Hopkins*, 118 U.S. 356. See Black, "The Supreme Court, 1966 Term, Foreword, 'State Action,' Equal Protection, and California's Proposition 14," 81 Harv. L. Rev. 69 (1967).

In *Reitman* v. *Mulkey*, *supra*, this Court held a California state constitutional provision, Article I, Section 26, enacted by a majority of the electorate voting in a general state-wide election, offensive to the 14th Amendment. This provision forbade that state from limiting the freedom and absolute discretion of any person to refuse to sell, lease or rent real property to any person he so desires. This case presents substantially the same issue, and it is respectfully submitted, therefore, *Reitman* requires reversal of the judgment below.

More happened here than the repeal of a fair housing ordinance. Proponents of equal housing legislation must not only again steer successfully through the city council a law prohibiting racial discrimination in housing, as they did in securing the adoption of ordinance Nos. 873-1964 and 926-1964. They must do far more. After having succeeded at the city council level, proponents of fair housing must now take the necessary steps to insure the placement of the proposed legislation on the ballot at a general or regular election. Appellant notes that to date even this step has not been undertaken. Assuming placement upon the ballot, proponents then must wage a political campaign sufficient in scope to reeducate an electorate which had previously indicated its adverse views towards fair legislation by approving Section 137.

Thus, hurdles against any future enactment of fair housing legislation in the City of Akron are presently considerably higher, and the prospects of success far dimmer than was the case before Section 137 became law. Indeed, Akron blacks are not only faced with the reality of not being able to muster sufficient strength by resort to the normal democratic process to obtain governmental protection against housing discrimination. Private discrimination in housing is now protected by the government and, therefore, has become in effect the public policy in the City of Akron. In short, what was condemned in

Buchanan v. *Warley*, 245 U.S. 60; *Shelley* v. *Kraemer*, 334 U.S. 1; and *Barrows* v. *Jackson*, *supra*, has now, pursuant to Section 137, become governmental policy in the City of Akron.

It is a fallacy to regard this, as did the court below, as a mere racially neutral decision by the people of Akron for the reason that the regulation of housing on racial grounds is of such special uniqueness that the legislative process in this area may be treated differently than in other fields. By majority vote, the electorate in Akron has enacted private racism into law and, as such, has deprived appellant and all other Negro residents of Akron of the guarantees the 14th Amendment secures.

The court below states that Section 137 is not, as it describes Article 1, Section 26, of the California Constitution, struck down in *Reitman* v. *Mulkey*, *supra*, an absolute prohibition against enactment of future fair housing legislation. Contrary to the understanding of the Ohio Supreme Court, neither was the California law an absolute prohibition against all future fair housing legislation. Equal housing laws could be enacted provided the difficult task of obtaining approval of a constitutional amendment repealing Article 1, Section 26, was accomplished. What Section 137 does (as was true of California's Article 1, Section 26), however, is to stack the cards so heavily against the proponents of equal housing legislation as to seriously impede, if not make all but impossible, the enactment of such legislation through the normal democratic process.

A state cannot clog the democratic progress so as to bring it to a halt without violating its obligations under the Constitution—in this case, its duty to accord to black residents equal protection and due process of law. Here the state has so limited and restricted its authority to protect against private racial discrimination that it has become an active participant in the perpetuation of that discrimination. And in that participation it has violated

the Constitution's command. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Evans* v. *Newton*, 382 U.S. 296. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. For the foregoing reasons, it is respectfully submitted that Section 137 is fatally defective and must fall.

III

Jones v. *Mayer* Requires Reversal of the Judgment Below

Section 137 is in fatal conflict with Title 42, Section 1982, and the decision of the Court in *Jones* v. *Mayer, supra*, requires that it be struck down. As in *Jones*, appellant based her claim in the court of original jurisdiction, *inter alia*, on the theory that Section 1982 had been violated. That section provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Presumably because it was felt that the Fourteenth Amendment questions adequately disposed of the matter, the Ohio courts failed to pass on the appellant's claimed violation of the federal law pursuant to the supremacy clause, Article VI, Section 2 of the United States Constitution. *Testa* v. *Katt*, 330 U.S. 386. Appellant did not raise the applicability of Section 1982 in her jurisdictional statement. The *Jones* case, however has added gloss to Section 1982 and has vindicated appellant's reliance on the statute. Therefore, appellant respectfully requests that her claim that Section 1982 invalidates the charter amendment be considered now. This Court has on prior occasions dispensed with the practice of considering only those questions raised prior to review on the merits. One of those occa-

sions, *Boynton* v. *Virginia*, 364 U.S. 454, 457, duly fits this case, for here as there "[d]iscrimination because of color is the core of the . . . broad constitutional questions presented . . . just as it is the core of the [statutory] question presented to the [state] Court.

The Civil Rights Act of 1866, from which Section 1982 was derived, was intended, this Court found, "to affirmatively secure for all men whatever their race or color . . . the 'great fundamental right,'" including the right to acquire property, free from public or private restraints imposed pursuant to racial discrimination. *Jones* v. *Mayer*, *supra*, at 36 L.W. 4667.

The question raised here, as in the preceding argument, is not whether Section 1982 requires Akron to enact an open housing law or prevents the repeal of such an ordinance. What is clear is that Akron cannot, as Section 137 seeks to do, impede and frustrate Congressional intent that a black and white man in Akron and throughout the United States be on equal terms in the housing market, all other things being equal. Akron has no discretion to proceed slowly to eliminate racial discrimination in this field. Congress by passage of the Civil Rights Act of 1866 had mandated the immediate end of all racial restrictions in housing. Any statute or ordinance which seeks to prevent the state from aiding and supporting this national objective or affirmatively attempts to frustrate Congressional intent must fall.

CONCLUSION

For the reason hereinabove stated, it is respectfully submitted that the judgment of the Ohio State Supreme Court is in error and should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

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Appellant,

vs.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

COUNTER-STATEMENT OF THE CASE.

It should be mentioned that the cause proceeded in the State courts upon an amended petition (not part of the printed record) upon which no alternative Writ of Mandamus was issued.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Where, after institution of litigation in a State Court, upon a Petition in Mandamus, to compel a Fair Housing Commission (established by certain municipal Fair Housing ordinances) to hear a complaint, there is enacted not only a comprehensive Federal Fair Housing Act but also a State Fair Housing Code; and where during the pendency of such litigation before this Court, it is determined that Section 1982 of Title 42 U. S. C. applies to

racial discrimination in all forms of housing, does not such litigation thus thereby become moot?

2. Does an amendment to a City Charter which requires that all fair housing litigation enacted by City Council be first approved by the electors before such litigation shall become effective, constitute invidious state action as prohibited by the 14th amendment?

ARGUMENT.

I.

THIS LITIGATION IS NOW MOOT.

The Appellant filed her original petition for Writ of Mandamus in the State Court on February 3, 1965. (App. 1.) In Ohio Mandamus is treated as an extraordinary legal remedy granted only in those cases where relief cannot be otherwise obtained. Had the action been filed after October 30, 1965, the Ohio courts would most likely have found her not entitled to the relief of Mandamus since adequate legal remedy was then available.

Effective October 30, 1965, Chapter 4112 of Title 41, Ohio Revised Code was amended to make unlawful certain discriminatory practices relating to the lease, rental, financing and sale of commercial and residential property and to provide the Ohio Civil Rights Commission with enforcement powers. (App. A, this Brief.)

The complaint of the Appellant, and of those similarly situated, as alleged in her petition, were complaints relating to the conduct of real estate agents and as such, are not within the purview of Section 1982, Title 42 U. S. C. Consequently, there is no conflict between amendment 137 and Section 1982 with respect to the matters presented to this Court under this litigation. (See App. B, this Brief and original record.)

The 90th Congress of the United States passed a Federal Civil Rights Act known as Public Law 90-284, which was signed by the President of the United States on April 11, 1968, and which provides for Fair Housing throughout the United States. The act, among other things, permits the aggrieved party to sue for actual and punitive damages and gives the Attorney General of the United States certain powers of enforcement.

On June 17, 1968, this Court held that Section 1982 of Title 42 U. S. C. prohibited private as well as public racial discrimination in the sale and rental of any and all housing in this country. So with two federal and one state law prohibiting housing discrimination only the parties, including Appellant who now resides beyond the State of Ohio, are concerned with this litigation which no longer requires the resolution of principles, the settlement of which is important to the public. It cannot be fairly said that the right to discriminate in Akron is immune from legislative, executive, or judicial regulation at that level of government. We urge this Court to return to its practice of not passing upon moot questions. See *Price vs. Sioux City Cemetery*, 349 U. S. 7.

II.

AKRON CHARTER AMENDMENT 137 DOES NOT CONSTITUTE SIGNIFICANT POSITIVE STATE ACTION.

Akron is not required to have fair housing legislation. Private invasion of individual rights is not the subject matter of the equal protection clause. *Civil Rights Cases*, 109 U. S. 3. The action prohibited by the equal protection clause of the Fourteenth Amendment is only such action as may fairly be said to be that of states or any of their subdivisions. *Shelley vs. Kramer*, 334 U. S. 1161.

The people of Akron by Charter Amendment 137 exercise the right to vote on Fair Housing, indicating in this sense they have taken state action, but such action is a far cry from any of the situations where this Court has found official involvement in invidious racial discrimination. It must also be not forgotten that this action did not repeal fair housing ordinances 873 and 926. A fair assessment of the potential impact of the political action of the citizens of Akron must lead only to the conclusion that such action was neither intended to authorize, nor does it authorize, private racial discrimination. *Reitman vs. Mulkey*, 387 U. S. 369.

When one considers the circumstances and conditions under which the amendment 137 was approved are considered, it becomes apparent that its immediate objective was to provide the citizens with an opportunity to pass upon fair housing legislation which the City Council had enacted as emergency measures. The record reveals that the fair housing ordinances were passed as emergency ordinances (App. 5 and 14). The record also reveals that the Charter Amendment petitions were filed with the clerk on August 25, 1964, the same being nearly 37 days after the first ordinance was enacted and 33 days after the amended ordinance was approved (App. 24).

No evidence on Appellant's complaint was adduced in the Court and no finding of fact was ever made thereon. The petitions to amend the charter came so soon after the ordinances were enacted that the Fair Housing Commission provided thereunder neither organized nor heard any complaints. Appellant's complaint was not filed until 187 days after Ordinance No. 873 was passed and after 80 days following the vote on the Charter Amendment (App. 24).

The Charter and State Law prohibits a referendum on emergency ordinances. When the people desire to have a vote on ordinances passed as emergency measures, they must either initiate a repeal petition or secure a charter amendment.

Whereas, the California Proposition 14 declares that no law shall be passed denying a person the right to decline to sell to such person as he chooses, Akron Charter Amendment 137 merely grants the people the right to vote on whatever Fair Housing legislation is enacted by the City Council. With the former, the ultimate impact is the potential for authorizing private racial discrimination, while the essential impact and thrust of the latter is to establish an atmosphere and environment of neutrality. The Chapter 137 action is no sweeping prohibition saying that nothing may be done concerning fair housing. This action does not make racial discrimination in housing lawful. This action does not repeal the ordinances (App. 50, para. 5).

As things stand today in Akron, the Council may order Ordinance No. 873 and 926 placed on the ballot at any time. Moreover, Council may also propose an amendment to the Charter for a repeal of Section 137, both of which procedures require no effort or place no burden upon the Appellant except, of course, that the matter is subject to the basic democratic process of majority rule—the accepted formula for structuring local governmental units.

Had Council chosen to pass these ordinances not as emergency legislation, then the right of repeal by referendum would have been available to the citizens of Akron, and we most likely would not be involved with this litigation, because a vote upholding the ordinances would end the challenge, while a repeal vote in all probability would

discourage Council from repeating the process. We have been unable to find any decisions of this Court which would indicate that a repealer would violate the Fourteenth Amendment.

Amendment 137 on the one hand makes it unnecessary to either initiate a repealer every time a Fair Housing Ordinance is enacted as an emergency measure, or to obtain a referendum every time such an ordinance is enacted as general legislation. On the other hand, it obviates the necessity of the citizens initiating fair housing legislation following either a former repeal by the voters or a disinclination of City Council to enact.

Section Two (2) of Article One (I) of the Constitution of the State of Ohio provides:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

The Supreme Court of Ohio made absolutely no finding of state involvement. There was no fact finding which established the existence of an environment of private discrimination encouraged by positive official action.

There was no finding that the ultimate impact of the amendment would result in official encouragement of private discrimination. In the absence of facts to the contrary, it would seem that this Court would be without precedent to overrule the Supreme Court of Ohio, which rendered a unanimous decision written by its Chief Justice.

When the purpose, scope, and operative effect of Charter Amendment 137 is examined by reasonable

minds, the conclusion is inescapable that to destroy it would be a trespass on the valid legislative domain of the people of Akron. If Fair Housing legislation should become a one way street, the whole structure of constitutional guarantees to the people may well collapse. This Court has traditionally avoided imposing federal constitutional limits on the allocation of the lawmaking process within state government. See: *Highland Farm Dairy Inc. v. J. D. Agnew,* 300 U. S. 608.

III.

CHARTER AMENDMENT 137 DOES NOT CREATE AN UNCONSTITUTIONAL CLASSIFICATION.

The legislative subject was created by the ordinance, i.e., a regulation of the business of dealing in the buying, selling, leasing, financing, and rental of real property. It is not irrational to expect that the people would desire to vote on the regulation of a subject so pervasive, vast and yet so intimate in application and effect.

The Charter Amendment does not establish an invidious racial distinction as this Court found in *McLaughlin v. Florida* and in *Loving v. Virginia.*

The Appellant would have Akron accused of official invidious racial discrimination, as proscribed by the Fourteenth Amendment, because its citizens chose to have the opportunity to vote on fair housing legislation.

IV.

Appellant, in her summary of argument makes the statement that no other kind of law which the Council of the City is empowered to promulgate must first be approved by the majority of electors. Appellee urges the Court to consider 86a and 86d of the Akron Charter which sections provide that all ordinances relating to tax levies

and assessments as well as income tax ordinances must be approved by the people. (See App. 26 and original record.)

Appellant asserts that the vice of California Proposition 14 was that it made difficult the effort to succeed in obtaining open housing legislation. As we read *Reitman v. Mulkey*, 387 U. S. 369, the vice of Proposition 14 was that it was intended to authorize and did authorize racial discrimination in housing. The Charter amendment of the City of Akron in no way lends official state action to such invidious purposes.

According to *Webster's Dictionary*, invidious means "Tending to excite odium, ill will or envy; likely to give offense." The Appellees strongly deny the implication that the right of the citizens to vote on whether Akron should or should not have fair housing legislation clothes official Akron with the mantle of the stigma of discrimination. This litigation presents no such invidious facts.

CONCLUSION.

For the reasons hereinabove stated, it is respectfully submitted that the judgment of the Supreme Court of the State of Ohio is not in error and should be affirmed.

Respectfully submitted,

ALVIN C. VINOPAL,
Assistant Director of Law,
City of Akron,
Attorney for Appellees.

APPENDIX A.

Ohio Revised Code, Title 41.

§ 4112.01 Definitions.

As used in sections 4112.01 to 4112.08, inclusive, of the Revised Code:

(A) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. It also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesman, agent, employee, lending institution; and the state, and all political sub-divisions, authorities, agencies, boards, and commissions thereof.

* * * * *

(J) "Housing accommodations" includes any building or *structure or portion* thereof which is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or leased for commercial housing.

(K) "Commercial housing" means housing accommodations held or offered for sale or rent by a real estate broker, salesman, or agent, or by any other person pursuant to authorization of the owner, by the owner himself, or by legal representatives, but does not include any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employee.

(L) "Personal residence" means a building or structure containing living quarters occupied or intended to be occupied by no more than two individuals, two groups, or two families living independently of each other and oc-

cupied by the owner thereof as a bona fide resident for himself and any members of his family forming his household. If a personal residence is vacated by the owner it shall continue to be considered owner-occupied until occupied by someone other than the owner or until sold by the owner, whichever occurs first.

(M) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing because of race, color, religion, national origin, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, national origin, or ancestry as a condition of affiliation or approval.

§ 4112.02 Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

* * * * *

(H) For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold commercial housing from any person because of the race, color, religion, ancestry, or national origin of any prospective owner, occupant, or user of such commercial housing;

(2) Represent to any person that commercial housing is not available for inspection when in fact it is is so available;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a *personal residence** from any person because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such

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* Italics added.

commercial housing, provided such person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects of his business or incidental to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling not merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or sub-leasing any commercial housing or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any commercial housing because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such commercial housing;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a *personal residence* because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such commercial housing or personal residence;

(6) Print, publish, or circulate any statement or advertisement relating to the sale, transfer, assignment, rental, lease, sub-lease, or acquisition of any commercial housing or *personal residence* or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a personal residence which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, ancestry, or national origin;

(7) Make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, ancestry, or national origin in connection with the sale or lease of any commercial housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing or a *personal residence;*

(8) Include in any transfer, rental, or lease of commercial housing or a *personal residence* any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any such restrictive covenant, provided that the prior inclusion of a restrictive covenant in the chain of title shall not be deemed a violation of this provision;

(9) Induce or solicit or attempt to induce or solicit a commercial housing or *personal residence* listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, ancestry, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, or ethnic composition of the block, neighborhood or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

No person shall discourage or attempt to discourage the purchase by a prospective purchaser of a commercial housing or a personal residence by representing that any block, neighborhood, or area has or might undergo a change with respect to the religious, racial, or nationality composition of the block, neighborhood, or area.

* * * * *

§ 4112.04 Powers and duties of the commission.

* * * * *

(6) Receive, investigate, and pass upon written charges made under oath of practices prohibited by Section 4112.02 of the Revised Code;

APPENDIX B.

Affidavit of Complaint.

STATE OF OHIO,
SUMMIT COUNTY, SS:

On Saturday, January 9, 1965, Mrs. Dorothy Marting, of Marting Realty, Inc., came to my home at 1433 Orlando Avenue, Akron, Ohio, to keep a prearranged appointment.

After Mrs. Marting and I got into her car, she stated that she could not show me any of the houses on the list she had prepared for me because all of the owners had specified they did not wish their houses shown to negroes. Mrs. Marting declined to show me any of the houses.

I told her that I wanted to see houses in the Litchfield-Firestone School district. Mrs. Marting mentioned a house on Cliffside, and said she would try to get the key. Later the same day, Mrs. Marting telephoned and said she could

not get the key. She offered to show me houses in the Buchtel High School district. I declined her offer. I have not heard from Mrs. Marting since that day.

I believe I have been discriminated against because of my race, color and ancestry which is a violation of City of Akron Ordinance No. 873-1964 as amended by Ordinance No. 926-1964.

NELLIE HUNTER.

(Jurat omitted.)

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 63

THE STATE OF OHIO, EX REL. NELLIE HUNTER ON BEHALF OF THE CITY OF AKRON, APPELLANT

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 12 Ohio St. 2d 116, 233 N.E. 2d 129.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 27, 1967. A notice of appeal to this Court was filed on March 16, 1968. Probable jurisdiction was noted on June 3, 1968 (391 U.S. 963). The jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

QUESTION PRESENTED

Whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, a municipal charter may provide that one class of ordinances—those dealing with racial or religious discrimination in the sale and rental of housing—is required to receive the approval of a majority of the voters before becoming effective.

INTEREST OF THE UNITED STATES

Section 801 of the Civil Rights Act of 1968, 82 Stat. 73, 81, declares: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." That policy, at least in its application to housing discrimination against Negroes, is not a new one. It has been federal law for more than a hundred years. 42 U.S.C. 1982; *Jones* v. *Mayer Co.*, 392 U.S. 409. Yet the consequences of decades of housing discrimination confront this nation with grave and pressing problems. See, *e.g.*, *Report of the National Advisory Commission on Civil Disorders*, Chs. VI, VIII, XVII (1968).[1]

[1] This Court has recognized the special force of claims relating to housing discrimination under the Equal Protection Clause. State-imposed residential segregation was held unconstitutional as early as 1917 (*Buchanan* v. *Warley*, 245 U.S. 60), at a time when present constitutional principles relating to enforced segregation in public and private schools (*Berea College* v. *Kentucky*, 211 U.S. 45; see *Gong Lum* v. *Rice*, 275 U.S. 78, 85-87; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 344, 349), transportation (*Plessy* v. *Ferguson*, 163 U.S. 537; see *McCabe* v. *Atchison, T. & S.F. Ry. Co.*, 235 U.S. 151, 160), and other areas (*e.g.*, *Pace* v. *Alabama*, 106 U.S. 583)

Title VIII of the Civil Rights Act of 1968 contemplates that federal, state and local agencies will share the obligation of enforcing the right to nondiscriminatory treatment in obtaining housing (see Sections 810(c), 815, 82 Stat. 86, 89). Involved in the instant case is a municipality's effort to establish a uniquely burdensome procedure as a prerequisite for its participation in the national effort to eradicate discrimination in housing. Compliance with that procedure presents invidious difficulties, at best, and, at worst, is impossible. Thus, the constitutionality of the prescribed procedure is of concern to the United States. Resolution of the question presented is likely to affect significantly the future role of other states or municipalities in taking, or in failing to take, appropriate steps to provide enforcement machinery for the important federal right to fair housing.

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had not yet been established. In the restrictive covenant cases (*Shelley* v. *Kraemer*, 334 U.S. 1; *Hund* v. *Hodge*, 334 U.S. 24; *Barrows* v. *Jackson*, 346 U.S. 249), the Court found prohibited state action in the enforcement of private discriminatory agreements, while the requisite state involvement has not been found as readily in other matters (see, *e.g.*, *Bell* v. *Maryland*, 378 U.S. 226, 328-333 (Black, J. dissenting)). In *Shelley* v. *Kraemer*, 334 U.S. at 10, the Court observed:

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. * * *

STATEMENT

On July 14, 1964, the Council of the City of Akron enacted Ordinance No. 873-1964 (A. 5-13). This ordinance prohibited various forms of racial discrimination in the sale and rental of housing.[1] A Commission on Equal Opportunity in Housing, attached to the Mayor's office, was established by the ordinance to enforce its prohibitions.[2] Ordinance No. 926-1964, approved on July 22, 1964, amended the enforcement procedure prescribed by the earlier ordinance to give the Commission authority to issue orders which, if necessary, could be judicially enforced (A. 14-16).

On August 25, 1964, petitions were filed with the City's Clerk of Council to require that a proposed Section 137, to be added to the City Charter, be voted upon by the Akron electorate at the November 3,

[1] Explicit findings regarding the need for such legislation were recited by the City Council in the preamble to the ordinance. It was found, *inter alia*, that many Akron citizens "live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing," and that "[t]hese conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of Akron" (A. 5). Nothing in the picture so painted by the City Council as existing in Akron can be viewed as atypical of conditions generally in our major urban areas.

[2] The Commission was empowered to conciliate complaints and, if conciliation failed, to "direct the Law Director of the City of Akron to commence an action in the Court of Common Pleas" (A. 10).

1964, general election (A. 24). Entitled "Regulation of Real Property Rights," the proposed Section 137 provided as follows (A. 27):

> Any ordinance enacted by the Council of the City of Akron which regulates the use, sale, advertisements, transfer, listing, assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

The proposed Charter amendment was passed by a majority of the voters at the November election (A. 19).

2. On January 26 and 27, 1965, appellant, a Negro resident of Akron, filed complaints with the Mayor

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* Section 136 of the Akron City Charter provides that proposed charter amendments may be submitted to the electors of the City "by a vote of six members of the Council, and upon petitions signed by ten per centum of the electors of the City" (A. 38). Section 19 of the Charter also provides for referenda on any ordinance or resolution passed by the City Council, if a petition for a referendum signed by 10 percent of the electors is submitted "within thirty days after an ordinance or resolution shall have been passed by the Council" (A. 34). Section 11 of the charter, it should be noted, provides that an initiative petition proposing a new law, if it contains the signatures of not less than seven percent of the city's voters, must be submitted for approval or rejection in the manner prescribed for referenda.

and with the Commission on Equal Opportunity in Housing alleging that she encountered discrimination on account of race in efforts to secure housing (A. 24). The Commission refused to process appellant's complaint, and she instituted the present action by filing a petition for a writ of mandamus in the Ohio Court of Appeals for the Ninth Judicial District requesting that the Mayor and the Commission be required to perform their duties under the city ordinances (A. 17). The State Court of Appeals initially sustained appellees' demurrer and denied the writ on the authority of *Porter* v. *Oberlin*, 1 Ohio St. 2d 143, 205 N.E. 2d 368, a decision of the Supreme Court of Ohio invalidating a similar enforcement provision contained in another municipal fair housing ordinance. On appeal, the Ohio Supreme Court reversed, holding that *Porter* v. *Oberlin* was inapplicable to the facts here presented (6 Ohio St. 2d 130, 216 N.E. 2d 371).

On remand, the court of appeals held that the City Charter provision was lawfully adopted and that it repealed the earlier fair housing ordinances.[5] Con-

[5] Appellant had contended, *inter alia*, that Section 137 was invalid since it in effect constituted an attempt to conduct a belated referendum on the two ordinances without complying with the prescribed procedure therefor (see A. 19). Appellant also squarely attacked the Charter amendment on federal constitutional grounds, alleging that it was adopted "with the sole purpose, intent and effect of preserving and reinforcing racial segregation in housing," that it was the only Charter provision which purports to bar City Council from effectively legislating in an area which otherwise is a proper subject for local legislation, and that it conflicts with 42 U.S.C. 1982, thereafter construed and upheld by this Court in *Jones* v. *Mayer Co.*, 392 U.S. 409 (A. 20, 23).

cluding that Section 137 was not in conflict with any federal or state constitutional provisions, the court denied the requested writ (A. 38-46). On appeal, the Supreme Court of Ohio affirmed (A. 47-52). That court rejected appellant's reliance on this Court's decision in *Reitman* v. *Mulkey*, 387 U.S. 369, finding the provisions of the state constitutional amendment there involved and those of Section 137 distinguishable. That was so, the court stated, because "the legislative authority of Akron may still enact legislation denying or limiting the so-called right referred to in the California constitutional provision, and such legislation would become effective on approval thereof by the electors of Akron" (A. 50). Moreover, the court rejected appellants' argument that Section 137 was unconstitutional because it "require[d] prior voter approval only with respect to the kind of ordinances described" in the Charter amendment (A. 51). To that contention, the court responded that it was reasonable to classify ordinances of the kind covered by Section 137 separately, because the legislative body may choose "to proceed slowly in such an emotionally involved field as race relations" (*ibid.*).

ARGUMENT

INTRODUCTION AND SUMMARY

This case presents an apparently difficult question. That is so because, on the surface, Section 137 of the Akron City Charter does no more than repeal existing fair housing ordinances and return to the electors of the municipality the decision whether they wish to legislate on this subject. Arguably, that

is an acceptable democratic solution to a troublesome issue. Yet, realistically viewed, the result is that the City of Akron has encouraged racial discrimination and substantially prejudiced the prospects for remedial governmental action at the local level. The issue then is whether this consequence, offensive as it is to the national policy of non-discrimination in housing, embedded in federal law for a century and only recently reaffirmed, may nevertheless be condoned because it is accomplished by deferring decision to the rule of popular democracy. In the present context, we think not.

Our conclusion is premised on two somewhat overlapping considerations. We believe Section 137 violates the Equal Protection Clause, first (*infra*, pp. 9-12), because it gratuitously promotes, and thereby involves the municipality in, private discrimination on the basis of race with respect to housing. This, we suggest, results from the concurrence of several factors: Section 137 was enacted against the background of existing fair housing ordinances, which it annulled; it is more, however, than a simple repeal; it freezes into the law for a substantial period a license to discriminate on the ground of race, religion and ethnic origin; and, by singling out this conduct for special procedures, Section 137 seems to lend it a special official sanction. If we are correct in so appraising the purpose and effect of Section 137, then the case is controlled by *Reitman* v. *Mulkey*, 387 U.S. 369.

Second, we argue (*infra*, pp. 12-19) that Section 137 impermissibly discriminates against classes of

citizens by creating unique obstacles to the enactment of legislation for their benefit. This objection has special force here, we believe, because—unlike California's Proposition 14 involved in *Reitman*, where the Court did not reach this contention—Section 137 expressly singles out remedial laws prohibiting discrimination on account of race, religion, national origin or ancestry for special enactment procedures. In our view, it is no answer that the method employed is a resort to popular referendum, an otherwise unobjectionable legislative technique. Here the automatic referendum requirement amounts to a device to prejudice the victims of discrimination in securing governmental relief, particularly effective because they are minority groups whose voice is likely to be drowned out under the regime of unabated majority rule.

I. SECTION 137 OF THE AKRON CITY CHARTER VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT SIGNIFICANTLY INVOLVES THE CITY IN RACIAL, RELIGIOUS AND ETHNIC DISCRIMINATION WITH RESPECT TO HOUSING

Reitman v. *Mulkey*, 387 U.S. 369, affirmed a judgment striking down California's Proposition 14 because that provision was found to have "significantly involve[d]" the state in the invidiously discriminatory practices of private individuals as regards access to housing (*id.* at 376, 378, 380, 381). The same principle, we believe, condemns Section 137 of the Akron City Charter. Here, as there, governmental action—initiated by the electorate—repealed pre-existing fair housing legislation. Yet, in both instances, the method

used "struck more deeply and more widely" than "a mere repeal of existing statutes" (*id.* at 376-377). In Akron, as in California, there has been no simple return to the *status quo ante*: henceforth the right to discriminate on account of race or religion or national origin is immunized by the fundamental law of the jurisdiction against local remedy, unless the people themselves shall determine to provide relief.

The cases, we submit, are comparable. To be sure, there are factual differences. The Akron Charter provision does not expressly declare a "right" to discriminate. But that is only a matter of wording: here the legislative body is, in terms, disabled from enacting a fair housing law; in California, it was prohibited from "deny[ing], limit[ing] or abridg[ing] * * * the right" to discriminate by enacting such a law. The message conveyed is identical: "You are free to engage in discriminatory practices until and unless a majority of the voters of the jurisdiction—who have just solemnly declared themselves in favor of freedom to engage in those practices—decides otherwise." Indeed, in Akron, the meaning is clearer in that Section 137—unlike Proposition 14—is expressly confined to discriminations "on the basis of race, color, religion, national origin or ancestry."

Nor can it be dispositive—as the Ohio Supreme Court apparently believed (A. 50)—that the Akron City Council, unlike the California legislature, retains the power to propose a fair housing law. After the adoption of Section 137, one surely may discount the possibility that the council—whose recent decision has been overturned by the voters—will itself sponsor a referendum on a measure of this kind. The reality is

that, in Akron as in California, the future of fair housing legislation depends, in the first instance, on the initiative process.[5] The critical fact is that in both jurisdictions the enactment of remedial legislation ultimately requires a favorable vote of a majority of the electorate. And that appears no more attainable in Akron than in California, for here, too, the presumptive victims of housing discrimination are a relatively small minority.[6]

The upshot is that Section 137—just like Proposition 14 in California—tends to defeat any reasonable expectation that any fair housing law will be enacted in the near future.[7] To that extent, it ensures the continuation of a laissez-faire regime under which discriminatory practices are condoned,[8] and thus en-

[5] Procedures involving initiative and referendum existed in California to overturn Proposition 14. See the government's *amicus* brief in *Reitman*, No. 483, 1966 Term, pp. 28-30.

[6] As of 1960, of 180,455 voting-age residents of the city, only 19,950—about 11 percent—were non-white. U.S. Bureau of the Census, *1960 Census of Population*, Vol. I, Part 37, Table 20, p. 72.

[7] According to figures obtained from the Akron *Beacon-Journal*, the vote on the adoption of Section 137 was 62,302 for and 46,392 against. Assuming a substantial and near-unanimous Negro vote against Section 137, the white voters of Akron approved the charter amendment by close to a two-to-one margin.

[8] This is in addition to the element of substantial delay in obtaining fair housing legislation in Akron which, in all events, Section 137 necessarily produces. If an initiative measure to propose a fair housing ordinance is the course that is followed, this entails the painstaking task of obtaining the necessary number of proper signatures, before a referendum vote can be sought (see note 4, *supra*, and note 11, *infra*). And even if the City Council should enact a new law, the ordinance would necessarily be delayed in becoming effective during the time that the required referendum vote thereon is scheduled and conducted. In this regard, it should be noted that Section 137 specifically rules

courages those who would engage in that discrimination. For this reason, we submit, Section 137 oversteps the line of neutrality and must fall under this Court's decision in *Reitman*.[18]

II. SECTION 137 OF THE AKRON CITY CHARTER VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE, IN SINGLING OUT FAIR HOUSING LEGISLATION FOR SPECIAL AND BURDENSOME ENACTMENT PROCEDURES, IT DISCRIMINATES AGAINST CLASSES OF CITIZENS

On its face, the challenged section of the Akron City Charter deals with one subject only—housing discrimination on account of race, religion or national origin. It does not—as did the provision involved in

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out the scheduling of a special election for such a referendum vote, since it in terms requires majority approval "at a regular or general election."

[18] Two district courts have followed this approach in striking down, even before approval by the electorate, "little Proposition 14s" in Milwaukee and Detroit. *Otey* v. *Common Council of the City of Milwaukee*, 281 F. Supp. 264 (E.D. Wisc.); *Holmes* v. *Leadbetter*, C.A. 31843, decided August 16, 1968 (E.D. Mich.).

A closely related, but somewhat different, issue is presented in *Holland* v. *Lucas County Board of Elections*, No. 77, this Term, which is presently pending on petition for certiorari. There the Toledo City Council enacted a fair housing ordinance which was petitioned to referendum and defeated by a majority of the electorate. While in terms the referendum vote simply repealed the ordinance, the actual effect of that action, under the City Charter, is to prevent any such enactment in the future without an affirmative vote thereon by a majority of the Toledo electorate. That charter provision, unlike Section 137 of the Akron charter, is a general one relating to all ordinances nullified by referendum vote, but the practical effect of its operation is similar, in that it requires electorate approval before a fair housing law can become effective in Toledo.

Reitman—purport to affect generally the right to transfer real property. In this particular, however, Section 137 is even more vulnerable than the California constitutional provision struck down in *Reitman*. The resulting prejudice to those classes of citizens who would benefit from fair housing legislation, we submit, violates the Equal Protection Clause.

Plainly, the purpose and effect of Section 137 is to remove from the ordinary lawmaking process a particular type of measure which would benefit Negroes and other minority groups. Before Section 137 was added to the City Charter, these minorities and other interested citizens could—as they did—persuade the elected representatives on the City Council to adopt a fair housing law. Such legislation would be vulnerable only if, within 30 days of its enactment, approximately 7,800 voters in Akron were to sign a referendum petition.[11] Only in those circumstances would a fair housing ordinance be put to a vote of the electorate.[12] Now, however, the burden has been

[11] Section 19 of the City Charter (A. 30–31) allows suspension of the operation of an ordinance if, within 30 days of its enactment, a referendum petition, signed by ten percent of the "electors of the City," is submitted to the Clerk of the Council. Under Section 21 of the Charter (A. 32–33), the required number of signatures is computed on the basis of the votes for the office of Mayor in the last preceding municipal election. According to the Summit County Board of Elections, 77,906 votes were cast in the November 1967 mayoralty election.

[12] In fact, in the instant case, the effort effectively to override the fair housing ordinances by proposing Section 137 as an initiative measure was not completed within the 30-day period which would have applied to obtain a referendum vote under Section 19 of the Akron Charter. That ground of challenge to Section 137 was, however, rejected by the lower courts on state law grounds (see A. 41–43).

shifted substantially. Those supporting fair housing legislation, unlike the proponents of any other municipal ordinance, must obtain not merely the approval of a majority of the City Council, but also the approval of a majority of the voters. Those opposing such a law have lifted from their shoulders the usual burden of obtaining the required number of signatures within the prescribed, short period of time to bring an enacted measure to a referendum vote. If proponents cannot succeed in having the City Council propose such a law in the face of a Charter provision like Section 137, their only recourse is to seek to follow the initiative route. Even if they succeed in convincing the Council members again to adopt a fair housing law, they—a distinct minority group—must wage a battle for majority support at the polls against substantial, indeed almost overwhelming, odds.

In short, whatever may be said about the tendency of Section 137 actively to encourage discriminatory housing practices, it is plain beyond debate that the challenged provision prejudices the victims of those practices by erecting a very real obstacle to the enactment of remedial legislation that would supplement the federal laws protecting them from such discrimination. Indeed, the Ohio Supreme Court expressly recognized as much when it characterized Section 137 as reflecting a decision "to proceed slowly in such an emotionally involved field as race relations" (A. 51). In other words, Section 137 is a deliberate brake on fair housing legislation.

It is difficult to appreciate how such a discrimination against the victims of bias and prejudice in hous-

ing can be squared with the mandate of the Fourteenth Amendment that no class of persons shall be denied "equal protection of the laws." See Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69.

The Equal Protection Clause prohibits a state or municipality from arbitrarily excluding voters from the booth (*e.g., Carrington v. Rash*, 380 U.S. 89; *Louisiana v. United States*, 380 U.S. 145; *Harper v. Virginia Board of Elections*, 383 U.S. 663), weighting their votes unequally (*Gray v. Sanders*, 372 U.S. 368), and giving greater representation to one class of voters than to another (*Reynolds v. Sims*, 377 U.S. 533; *Avery v. Midland County*, 390 U.S. 474). The same principles which forbid these and other forms of imbalance in the electoral processes apply, *a fortiori*, when what is at stake is the end product to which these are preliminary and preparatory stages, *i.e.*, the very enactment of legislation. It would obviously defeat the purpose of the voter equality guaranteed by *Reynolds* and *Avery*, and this Court's related decisions, if a state or local government, in fashioning procedures for the enactment of legislation, could build the inequalities prohibited at the voting or representational stages into the lawmaking process. Thus, just as a state may not weight its legislature to overrepresent rural interests, so also it may not provide, for example, that laws benefitting its cities shall become effective only if passed by three successive legislatures. And the constitutional inhibition against disenfranchising Negroes or the poor would forbid a state to prescribe, for instance, that laws

protecting the rights of racial minorities or laws designed to help the disadvantaged require a two-thirds vote in its legislature.

In light of these well-settled principles, it seems plain that Section 137 impermissibly discriminates against classes of citizens. It is wholly irrelevant that, in other neutral areas, more onerous procedures may properly be imposed for the enactment of particular measures. The court below to the contrary notwithstanding (A. 51), singling out for harsher treatment legislation that directly affects discrimination on account of race, religion or national origin is not a "reasonable classification." The Constitution itself forbids that inequality. Certainly, it cannot be condoned today when federal law expressly prohibits race and other invidious discrimination in housing. See Civil Rights Act of 1968, Title VIII, 82 Stat. 81; *Jones* v. *Mayer Co.*, 392 U.S. 409.[13]

[13] Contrary to the suggestion of appellees in their motion to dismiss, the enactment of Title VIII of the Civil Rights Act of 1968 has not rendered this case moot. The 1968 statute contemplates local enforcement in the manner prescribed by the now-repealed Akron fair housing ordinance. Indeed, Section 810(c) of the federal statute requires that deference be given to state or local enforcement "[w]herever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies" to those provided in Title VIII. Moreover, Section 815 provides that nothing in the federal statute "shall be construed to invalidate or limit any law of a State or political subdivision of a State * * * that grants, guarantees, or protects the same rights as are granted" by Title VIII.

Nor does this Court's decision in *Jones* v. *Mayer Co.*, 392 U.S. 409, to the effect that 42 U.S.C. 1982, enacted in 1866, constitutionally reaches private discrimination in property

It remains only to consider whether Section 137, despite its discriminatory effect, is saved from constitutional challenge because it embodies a decision of the citizens of Akron as a whole to deal with the problem of housing discrimination in a "democratic" way. Certainly, popular initiative or ratification of an unconstitutional law does not immunize it. The most recent application of that obvious principle was in *Reitman* itself, involving an amendment to the California Constitution adopted by popular initiative. See, also, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638; *Lucas* v. *Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 736. But it might be said that there can be no objection to a measure which simply transfers legislative authority to the rule of popular democracy.

There is, of course, no constitutional inhibition, as such, on returning legislative power to the general electorate. On the other hand, the democratic principles embodied in our Constitution certainly do not prompt such a solution. Indeed, if one were to derive a guiding rule in our institutional history, it would seem to be that free recourse to the political process ought to be afforded by all existing avenues, includ-

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transactions, moot the instant appeal. As the Court there noted, "Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law." While enforcement by injunctive suit or criminal action is available under other federal statutes, Section 1982 itself contains no detailed remedial framework. Thus, even more than the 1965 statute, it can properly be viewed as contemplating state and local supplementation and enforcement. Thus, there is no basis for a claim of federal pre-emption here as to either statute.

ing initiative, referendum and a representative legislature. Thus, since Akron like most municipalities allows its electorate to be heard directly through initiative and referendum, the net effect of Section 137, in eliminating one method of enacting legislation, is to restrict, or clog, the lawmaking process, rather than open it up. One traditional path is now closed and the hands of the people's representatives are tied should they wish to act progressively in the interest of the community as a whole.

Nonetheless, the manner in which legislative power is exercised is a question which the Constitution normally leaves to local option. But it does not follow that a referendum requirement never oversteps constitutional boundaries. The controlling rule, we submit, is that announced by this Court in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347, answering the claim that there could be no constitutional issue with respect to a mere change in municipal boundaries:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. . . .

So, here, it does not matter that the means employed to discourage or delay the enactment of legislation to secure the rights of minorities was an automatic referendum requirement. That superficially innocuous method is invidious because the victims of housing discrimination, the most interested proponents of remedial laws, are relatively small minorities.

Whatever the result if Akron had decided to submit all decisions to the people—an obviously impractical solution for an urban center today—that is not what happened here. Cf. *Anderson v. Martin*, 375 U.S. 399.[14] Special procedures were devised for legislation barring racial, religious and ethnic discrimination with respect to housing—and nothing else. To paraphrase *Gomillion* (364 U.S. at 347), the municipality did not determine to essay participatory democracy "with incidental inconvenience" to Negroes and other victims of housing discrimination; rather, the design was to create a special barrier to the enactment of fair housing legislation, by resort to a mechanism which incidentally included the entire electorate in the legislative process. Accordingly, Section 137 must fall.

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[14] There a state law which required the designation of each candidate's race on the ballots used by voters was found to violate the Fourteenth Amendment. It was argued that the requirement reasonably served to inform the electorate about the candidates, and was non-discriminatory because it applied equally to Negro and white candidates. Rejecting those arguments, the Court concluded that the statute unconstitutionally placed the power of the state behind a racial classification that served to induce racial prejudice at the polls (*id.* at 402). There the statute was held invalid because it directed "the citizen's attention to the single consideration of race or color" (*ibid.*); here, by singling out fair housing laws for special procedural treatment, Akron has taken a similar, and similarly proscribed, step. Cf. *Gaus v. Board of Education*, 373 U.S. 683, 688.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1968.

Nellie Hunter, Appellant, v. Edward O. Erickson, Mayor of City of Akron, et al. } On Appeal From the Supreme Court of Ohio.

[January 20, 1969.]

Mr. Justice White delivered the opinion of the Court.

The question in this case is whether the City of Akron, Ohio, has denied its Negro citizen Nellie Hunter the equal protection of its laws by amending the city charter to prevent the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron.

The Akron City Council in 1964 enacted a fair housing ordinance premised on a recognition of the social and economic losses to society which flow from substandard, ghetto housing and its tendency to breed discrimination and segregation contrary to the policy of the city to "assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin." Akron Ordinance No. 873–1964 § 1. A Commission on Equal Opportunity in Housing was established by the ordinance in the office of the Mayor to enforce the antidiscrimination sections of the ordinance through conciliation or persuation if possible, but if not then "through such order as the facts warrant," based upon a hearing at which witnesses may be subpoenaed, and entitled to enforcement in the courts. Akron Ordinance No. 873–1964, as amended by Akron Ordinance No. 926–1964.

Seeking to invoke this machinery which had been established by the city for her benefit, Nellie Hunter

addressed a complaint to the Commission asserting that a real estate agent had come to show her a list of houses for sale, but that on meeting Miss Hunter the agent "stated that she could not show me any of the houses on the list she had prepared for me because all of the owners had specified they did not wish their houses shown to negroes." Miss Hunter's affidavit met with the reply that the fair housing ordinance was unavailable to her because the city charter had been amended to provide:

> "Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisements, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein." Akron City Charter § 137.

The proposal for the charter amendment had been placed on the ballot at a general election upon petition of more than 10% of Akron's voters, and the amendment had been duly passed by a majority.

Petitioner then brought an action in the Ohio courts on behalf of the municipality, herself, and all others similarly situated, to obtain a writ of mandamus requiring the Mayor to convene the Commission and to require the Commission and the Director of Law to enforce the fair housing ordinance and process her complaint. The trial court initially held the enforcement provisions of the fair housing ordinance invalid under state law, but the Supreme Court of Ohio reversed, *State ex rel. Hunter v. Erickson*, 6 Ohio St. 2d 130, 216 N. E. 2d 371 (1966).

On remand, the trial court held that the fair housing ordinance was rendered ineffective by the charter amendment, and the Supreme Court of Ohio affirmed, holding that the charter amendment was not repugnant to the Equal Protection Clause of the Constitution.

Akron contends that this case has been rendered moot by the passage of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73, the decision of this Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968), and the passage of an Ohio Act of October 30, 1965, Ohio Rev. Code, Tit. 41, c. 4112. It is true that each of these events is related to open housing, but none of the legislation involved was intended to pre-empt local housing ordinances or provide rights and remedies which are effective substitutes for the Akron law.

The 1968 Civil Rights Act specifically preserves and defers to local fair housing laws,[1] and the 1866 Civil Rights Act[2] considered in *Jones* should be read together with the later statute on the same subject, *United States* v. *Stewart*, 311 U. S. 60, 64–65 (1940); *Talbot* v. *Seeman*, 1 Cranch 1, 34–35 (1801), so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves. If the Ohio statute mooted the case, surely the Ohio Supreme Court would have so held when the validity of the Akron ordinance was twice before it after the Ohio statute was passed. Moreover, the sections of the Ohio law which are crucial here apply only to "commercial housing," and on any reading

[1] Nothing in the federal statute is to be construed "to invalidate or limit any law of a State or political subdivision of a State" giving similar housing rights, and deference is to be given to local enforcement. Civil Rights Act of 1968, Tit. VIII, §§ 815, 810 (c), 82 Stat. 73, 89, 86.

[2] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." C. 31, § 1, 14 Stat. 27, as amended, 42 U. S. C. § 1982.

we can imagine do not apply to Miss Hunter's case,[3] though the Akron ordinance does. Finally, the case cannot be considered moot since the Akron ordinance provides an enforcement mechanism unmatched by either state or federal legislation. Unlike state or federal programs, the Akron ordinance brings local people together for conciliation and persuasion by and before a local tribunal. It is to precisely this sort of very localized solution to which Congress meant to defer. We therefore reject the contention that this case is moot.

Akron argues that this case is unlike *Reitman* v. *Mulkey*, 387 U. S. 369 (1967) in that here the city charter declares no right to discriminate in housing, authorizes and encourages no housing discrimination, and places no ban on the enactment of fair housing ordinances. But we need not rest on *Reitman* to decide this case. Here, unlike *Reitman*, there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters.

By adding § 137 to its Charter the City of Akron, which unquestionably wields state power,[4] not only sus-

[3] The Ohio statute makes it unlawful for "any person" to "[r]efuse to sell . . . or otherwise deny or withhold *commercial* housing from any person because of the race [or] color" of the prospective owner. 41 Ohio Rev. Code §§ 4112.02 (H) and 4112.02 (H)(1) (1965) (emphasis added). "Commercial housing" is defined to exclude "any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employee." 41 Ohio Rev. Code § 4112.01(K) (1965). The statute makes it unlawful to "[p]rint, publish, or circulate any statement or advertisement relating to the sale [of a] . . . personal residence . . . which indicates any preference, limitation, specification, or discrimination based upon race . . . ." Since Miss Hunter does not seek commercial housing, or complain of the affront to her sensibilities of hearing a "circulated" statement (if the Ohio statute goes that far) she cannot obtain the relief she seeks under the Ohio statute.

[4] See, *e. g.*, *Evans* v. *Newton*, 382 U. S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

pended the operation of the existing ordinance forbidding housing discrimination, but required the approval of the electors before any future ordinance could take effect.[5] Section 137 thus drew a distinction between those groups seeking the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: the ordinance would become effective 30 days after passage by the City Council, or immediately if passed as an emergency measure, and would be subject to referendum only if 10% of the electors so requested by filing a proper and timely petition.[6] Passage by the Council sufficed unless the electors themselves invoked the general referendum provisions of the City Charter. But for those who sought protection against racial bias, the approval of the City Council was not enough. A referendum was required by charter at a general or regular election, without any provision for use of the expedited special election ordinarily available. The Akron Charter obviously made it substantially more difficult to secure enactment of ordinances subject to § 137.

Only laws to end housing discrimination based on "race, color, religion, national origin or ancestry" must run § 137's gauntlet. It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But § 137

[5] Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.

[6] Ordinances may be initiated through a petition signed by 7% of the voters, and the city charter may be amended or measures enacted by the council repealed through a referendum which may be obtained on petition of 10% of the voters.

nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson* v. *Martin*, 375 U. S. 399 (1964), § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. Cf. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Avery* v. *Midland County*, 390 U. S. 474 (1968). The preamble to the open housing ordinance which was suspended by § 137 recited that the population of Akron consists of "people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing." Such was the situation in Akron. It is against this background that the referendum required by § 137 must be assessed.

Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, *Slaughter-House Cases*, 16

Wall. 36, 71 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880); *Ex parte Virginia*, 100 U. S. 339, 344–345 (1880); *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964); *Loving* v. *Virginia*, 388 U. S. 1, 10 (1968), racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954), subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944). They "bear a far heavier burden of justification" than other classifications, *McLaughlin* v. *Florida*, 379 U. S. 184, 194 (1964).

We are unimpressed with any of the State's justifications for its discrimination. Characterizing it simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of § 137, but does not justify it. The amendment was unnecessary either to implement a decision to go slowly, or to allow the people of Akron to participate in that decision.[7] Likewise, insisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 736–737 (1964). The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so,

[7] The people of Akron had the power to initiate legislation, or to review council decisions, even before § 137. See n. 6, *supra*. The procedural prerequisites for this popular action are perfectly reasonable, as the gathering of 10% of the voters' signatures in the course of passing § 137 illustrates.

English-speaking people." I now protest just as vigorously against use of the Equal Protection Clause to bar States from repealing laws that the Court wants the States to retain. Of course the Court under the ruling of *Marbury v. Madison*, 1 Cranch 137 (1803), has power to invalidate state laws that discriminate on account of race. But it does not have power to put roadblocks to prevent States from repealing these laws. Here, I think the Court needs to control itself, and not, as it is doing, encroach on the States' powers to repeal its old laws when it decides to do so.

Another argument used by the Court supposed to support its holding is that we have in a number of our cases supported the right to vote without discrimination. And we have. But in no one of them have we held that a State is without power to repeal its own laws when convinced by experience that a law is not serving a useful purpose. Moreover, it is the Court's opinion here that casts aspersions upon the right of citizens to vote. I say that for this reason. Akron's repealing law here held unconstitutional, provides that an ordinance in the fair housing field in Akron "must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective." The Court uses this granted right of the people to vote on this important legislation as a key argument for holding that the repealer denies equal protection to Negroes. Just consider that for a moment. In this Government, which we boast is "of the people, for the people and by the people," conditioning the enactment of a law on a majority vote of the people condemns that law as unconstitutional in the eyes of the Court! There may have been other state laws held unconstitutional in the past on grounds that they are equally as fallacious and undemocratic as those the Court relies on today,

but if so I do not recall such cases at the moment. It is time, I think, to recall that the Equal Protection Clause does not empower this Court to decide what state ordinances or laws a State may repeal. I would not strike down this repealing ordinance.

the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. Cf. *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Avery* v. *Midland County*, 390 U. S. 474 (1968). We hold that § 137 discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1968.

Nellie Hunter, Appellant,
v.
Edward O. Erickson, Mayor of City of Akron, et al.

On Appeal From the Supreme Court of Ohio.

[January 20, 1969]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

At the outset, I think it well to sketch my constitutional approach to state statutes which structure the internal governmental process and which are challenged under the Equal Protection Clause of the Fourteenth Amendment. For Equal Protection purposes, I believe that laws which define the powers of political institutions fall into two classes. First, a statute may have the clear purpose of making it more difficult for racial and religious minorities to further their political aims. Like any other statute which is discriminatory on its face, such a law cannot be permitted to stand unless it can be supported by state interests of the most weighty and substantial kind. *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964).

Most laws which define the structure of political institutions, however, fall into a second class. They are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents. Consider, for example, Akron's procedure which requires that almost any ordinance be submitted to a general referendum if 10% of the

electorate signs an appropriate petition.* This rule obviously does not have the purpose of protecting one particular group to the detriment of all others. It will sometimes operate in favor of one faction; sometimes in favor of another. Akron has adopted the referendum system because its citizens believe that whenever an action of the City Council raises the emotional opposition of *any* significant group in the community, the people should have a right to decide the matter directly. Statutes of this type, which are grounded upon general democratic principle, do not violate the Equal Protection Clause simply because they occasionally operate to disadvantage Negro political interests. If a governmental institution is to be fair, one group cannot always be expected to win. If the Council's Fair Housing legislation were defeated at a referendum, Negroes would undoubtedly lose an important political battle, but they would not thereby be denied Equal Protection.

This same analysis applies to other institutions of government which are even more solidly rooted in our history than is the referendum. The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on Equal Protection grounds since they are founded on

*Section 25 of Akron's City Charter exempts the following ordinances from the referendum procedure:

"(a) Annual appropriation ordinances. (b) Ordinances or resolutions providing for the approval or disapproval of appointments or removals made by Council. (c) Actions by Council on the approval of official bonds. (d) Ordinances or resolutions providing for the submission of any proposition to the vote of the electors. (e) Ordinances providing for street improvements petitioned for by owners of a majority of the feet front of the property benefited and to be specially assessed for the cost thereof."

It is not suggested that any of these exceptions were made with the purpose of disadvantaging Negro political interests.

neutral principles. Similarly, the rule which makes it relatively difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments. Here, too, Negroes may stand to gain by the rule if a Fair Housing law is made part of the constitution, or they may lose if the constitution adopts a position of strict neutrality on the question. See *Reitman* v. *Mulkey*, 387 U. S. 369, 389 (1967) (Dissenting opinion of HARLAN, J.). But even if Negroes are obliged to undertake the arduous task of amending the state constitution, they are not thereby denied Equal Protection. For the rule making constitutional amendment difficult is grounded in neutral principle.

In the case before us, however, the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest. Since the Charter Amendment is discriminatory on its face, Akron must "bear a far heavier burden of justification" than is required in the normal case. *McLaughlin* v. *Florida*, 379 U. S. 184, 194 (1964). And Akron has failed to sustain this burden. The City's principal argument in support of the Charter Amendment relies on the undisputed fact that Fair Housing legislation may often be expected to raise the passions of the community to their highest pitch. It was not necessary, however, to pass this amendment in order to assure that particularly sensitive issues will ultimately be decided by the general electorate. Akron has already provided a procedure, which is grounded in neutral principle, that requires a general referendum on this issue if 10% of the vot-

ers insist. If the prospect of Fair Housing legislation really arouses passionate opposition, the voters will have the final say. Consequently, the Charter Amendment will have its real impact only when fair housing does *not* arouse extraordinary controversy. This being the case, I can perceive no legitimate state interest which in any degree vindicates the action taken by the City here.

As I read the Court's opinion to be entirely consistent with the basic principles which I believe control this case, I join in it.

SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1968.

Nellie Hunter, Appellant, v. Edward O. Erickson, Mayor of City of Akron, et al. } On Appeal From the Supreme Court of Ohio.

[January 20, 1969.]

Mr. Justice Black, dissenting.

Section 10, Art. I, of the Constitution provides, among other things, that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." But there is no constitutional provision anywhere which bars any State from repealing any law on any subject at any time it pleases. Although the Court denies the fact, I read its opinion as holding that a city that "wields state power" is barred from repealing an existing ordinance that forbids discrimination in the sale, lease, or financing of real property "on the basis of race, color, religion, national origin or ancestry . . . ." The result of what the Court does is precisely as though it had commanded the State by mandamus or injunction to keep on its books and enforce what the Court favors as a fair housing law.

The Court purports to find its power to forbid the city to repeal its laws in the provision of the Fourteenth Amendment forbidding a State to "deny to any person within its jurisdiction the equal protection of the laws." For some time I have been filing my protests against the Court's use of the Due Process Clause to strike down state laws that shock the Court's conscience, offend the Court's sense of what it considers to be "fair" or "fundamental" or "arbitrary" or "contrary to the beliefs of the